No. 20822

In the

United States Court of Appeals For the Ninth Circuit

INSURANCE COMPANY OF NORTH AMERICA
a corporation

Appellant,

vs.

THOMAS J. THOMPSON,

Appellee.

BRIEF OF APPELLANT

Appeal from the United States District Court
for the District of Idaho
Southern Division

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BRIEF OF APPELLANT

I. JURISDICTION

Jurisdiction is conferred by 28 USCA Section 1332. The Complaint was filed in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, on January 7, 1965. (R. 10-12). Appellant filed its Petition for Removal of said cause to the United States District Court for the Southern Division of Idaho on January 27, 1965 (R. 6-8), The District Court found jurisdiction in its pretrial conference order (R. 47).

Jurisdiction of the Circuit Court of Appeal is based on the fact that Appellant filed its Notice of Appeal herein on December 10, 1965 (R.220) appealing from the Final Judgment entered in the action on the 24th day of November, 1965 (R.182) based upon the verdict of the jury finding for the Plaintiff dated November 18, 1965 (R.179) and the Decision of the court fixing attorneys fees in favor of the Plaintiff, and further appealing from the Order of the court (R. 218) denying Appellant's motions of December 2, for Judgment notwithstanding the verdict (R. 187-192) and alternative motion of appellant for new trial (R.194-196).

Jurisdiction of this Court in this Appeal is confirmed by 28 USCA Section 1291 based upon said Notice of Appeal and the undertaking on Appeal properly filed herein (R. 222-223).

II STATEMENT OF FACT

This is an action by the Appellee to recover the total and permanent disability benefits allegedly due to him under an optional accident and disability insurance policy issued by Appellant. Appellant's policy OKU 6303 was issued to Morrison-Knudsen, Inc., and affiliated companies covering a period of July 1, 1963, through July 1, 1964, whereby Appellant agreed to insure such eligible persons who elected to become insured under the policy by meeting its conditions and paying the premium (See policy, R. 37-45, Exhibit 4). Appellee was an employee of Constructora Emkay, S.A., a Nevada corporation, subsidiary of Morrison-Knudsen, Inc., and applied for coverage under said insurance policy on a standard application form (R.48,

Exhibit 5). No medical examination was required, the effective date of the policy was September 1, 1963, and there was deducted from the pay of said Appellee for the months of September and October a monthly amount of $6.25. (T.R. 40). The insurance was effective through October 31, 1963. (T.R. 240). Only salaried employees of said companies after 90 days of employment were qualified to obtain the policy. (TR 242-243)

Appellee, at his last birthday on January 21, 1963, was 56 years old (R. 52, TR 11). Prior to the accident on September 9, 1963, appellee had been involved in a number of industrial accidents. Following the alleged accident on September 9, 1963, Appellant received a letter about the injury on or about August 19, 1964, and on or about September 9, 1964, received the completed standard Proof of Loss and physician's statement signed by Appellee and Appellee's doctor, Dr. Jerome E. Burton, both dated September 8, 1964. (R. 52, TR 3-4).

The appellant's policy of insurance protects

". . . against specified loss described in Part 1—Description of Coverage resulting directly and independently of all other causes from bodily injuries caused by accident while this policy is in force . . ."

"This policy does not cover loss caused by or resulting from any one or more of the following:

A. . . .

B. . . .

C. . . .

D. Illness, disease, pregnancy, childbirth, miscarriage, bodily infirmity or any bacterial infection

other than bacterial infection occurring in consequence of an accidental cut or wound,

E. ..." (R37, 39, Ex. 4)

A. PRIOR DISABILITIES FROM INJURIES.

Prior to the alleged accident of September 9, 1963, Appellee had suffered numerous disabling injuries. Proceeding backward in time, on May 24, 1963, Appellee was involved in an explosion and tunnel fire on the same job near Bogota, Columbia, resulting in material burns to his hands, face and lungs, together with other minor injuries. Appellee's witness, Dr. Franklin David, had examined Appellee on December 31, 1963, for evaluation of the disability from such burns and had found that he had a partial bronchial obstruction, he had poor aeration of the lungs on deep breathing, and ". . . with very minimal exercise, he was very short of breath." (TR. 213) He evaluated the pulmonary disability as to a percentage of disability of the whole body as 40% of the total. (TR 220) The history Mr. Thompson gave Dr. David was that afer the tunnel fire, ". . . he noticed shortness of breath, less physical endurance, cannot walk in hills like before without stopping and resting, and chronic cough." (TR 217). The fact, unrelated to the September 9, 1963, accident was also testified to by Mr. Thompson, who stated that he was in the hospital 24 days after the fire (TR 246), was off the job from May 24, to July 10, 1963 (TR 47), and he would notice his shortness of breath after walking a couple of blocks (TR 50). Dr. David also noted calcified nodules in both lung fields as evidence of early pulmonary fibrosis (TR 218), chronic bronchitis, emphysema and wheezing indicating asthma (TR 219). Dr. David further stated as to the relation of the May 24th tunnel fire

and the disability existing at the time of the trial that

> "Well, the relationship would be that certainly some of it (disability) still exists and any further impairment imposed upon his previous impairment would perhaps more significantly disable him now." (Tr 21)

When given a hypothetical question listing all of the previous events of injury to Appellee, the doctor stated that while you could not total these to reach a total pre-existing disability,

> "Q. But they would add an accumulation of disability, would they not in some extent?
>
> "A. Yes, I think they would increase his pre-existing disability to that of his September 9, if that is what you mean." (TR 223)

The degree of disability is shown by the fact that Appellee after he returned to work could not return to his normal job until sometime in August (TR 51), thus being in some condition of recovery from the May 24 event for at least 2½ months. It is interesting to note that the application for the insurance here involved was made August 23, 1963.

The next accident prior to the fire of May 24, 1963, was an injury of April 19, 1963. Working on the same job in Columbia, Appellee strained his right side and groin while lifting a steel support, developing a hernia that is still painful (TR. 107), and losing maybe two days' work. (TR 61-62)

Prior to this injury, Appellee suffered an injury on June 26, 1962, while mining for the Eby Construction

Company on construction of Titan missile silos. Appellee slipped on some grease and oil while going over some equipment and ". . . went down through these machines and I hit my back on one of the machines when I went down through them." (TR-62) He was off work for approximately two months, taking pain pills for two to two and one-half months, for injury to the back around the belt line. (TR-62). The industrial accident rating was ten per cent of the loss of the leg at the hip. (TR-82).

The next injury suffered by Appellee was October 24, 1961, at Hardin, Montana. He was bent over putting some steel behind a rock drilling machine when the machine toppled over on top of him, striking him in the neck and back. (TR-63).

Prior to this, the Appellee suffered an injury on August 20, 1960, while working for the Gilmore and Skoubye Steel Construction Company. In working around steel reinforcing, he raised up, striking his head against abar which had been placed above Appellee's position and welded in place without his noticing it, creating a complaint of headaches and aching in his neck. (TR-64). He was off work approximately two and one-half months. (TR-65). The industrial disability rating on this injury was ten per cent of the loss of the arm at the shoulder.

Prior to this, the Appellee suffered a major injury on August 24, 1953, while he was timbering a drift in a mining job for the Cordero Mining Company in Nevada. A slab of rock fell on his head and he suffered pain in his head, neck and some pain in his right arm and right shoulder. He spent a considerable time in re-

habilitation, including physical therapy and wearing a neck brace for approximately three to four months. He was off the job approximately eight months. (TR 55, 56) As a result of this injury, he received industrial accident rating of a disability equal to twenty-five per cent of the total body. (TR-82). Dr. Mack of Reno, Nevada, who treated him in part for this injury stated that despite such treatment he had almost constant headaches, episodes of neck pain, weakness in the right hand and arm and occasional episodes of numbness in the forearm with considerable stiff neck. (TR-323) Examination by Dr. Mack revealed that despite the statements of pain, the examination did not reveal any reflex changes nor did x-rays reveal any gross defect. The diagnosis by Dr. Mack at that time was:

> "This man appears to have a root compression syndrome. On physical examination it is difficult to make out which root is involved. I think it possibly is C-7 on the right . . . at that point it was my impression that it might be necessary to undertake a root decompression . . ." (TR-325)

Dr. Mack followed the patient as a neurological specialist from October until the end of April, 1954. As late as March 1954, Dr. Mack still stated that Appellee complained of severe headaches and inter-scapular pain with pain between the shoulder blades. (TR-328) Questioned concerning the findings of Dr. Kiefer on the operation of the cervical spine in February of 1964 and the fact that Dr. Kiefer found anterior to the nerve root at the C-7 level a hard protrusion accompanied by osteophyte (a small bony outgrowth) formation, Dr. Mack stated as to this possibly relating back to the 1953 instance that:

"Yes, that is possible, that is a chronic condition which has to have existed for some years. While one cannot be dogmatic about the number of years, it is very possible that this relates to the extent of ten years previously." (TR-334)

The severity of the 1953 injury to the neck in the same area as the 1964 injury is indicated by the fact that Dr. Mack found in the earlier examinations of the Appellee that he had limited motion of his neck in all directions, and that considerable pain continued through the period of more than eight months after the accident, which inclined the doctor to recommend surgery, which Appellee refused (TR-329).

Another injury about this same time was an instance on November 10, 1955, where the Appellee was working at Cobalt, Idaho, and strained his back lifting a timber. He was off work approximately five days at that time. (TR-66). Also on October 31, 1952, he picked up a machine, stumbled and wrenched his back. He was off work approximately one week. (TR-67).

Prior to this a major accident occurred to the Appellee on November 11, 1947, while working for the Cordero Mining Company in Nevada. At that time he was running a drilling machine, the steel broke and the machine tipped over backwards at which time Appellee sought to grab the machine and fell off the platform, falling about six feet and landing on his back across a stack of timbers. He was off work a little over a year following that accident and had a fusion operation with bone grafts from his legs. (TR-65-66) This resulted in a solid surgically fused lumbrosacral joint (TR-179) with a disability rating by the Industrial Ac-

cident Commission of Nevada of twenty-five per cent of the whole body. (TR-66) Since the 1947 accident Appellee's ability to bend forward and back has been extremely limited including his inability to tie his shoes. (TR-265, 359)

Appellee has worked up to positions of responsibility in supervising large groups of construction workers and miners. (TR-11-13) Some time in 1959 he went to Iran for Morrison-Knudsen Company, where he was assistant superintendent (TR-15), with 60 to 70 men under him most of the time and toward the end of the job as many as 150. (TR-75) Prior to going to Iran he worked on the Brownlee Dam Project in Hell's Canyon on the Snake River from 1955 to 1958, where he supervised approximately 35 men. (TR-77) He went to El Colegio in South America in September, 1962, as foreman or walking boss (TR-18) and supervised some 35-40 men. (TR-77) His responsibilities, particularly in Iran, included teaching the men how to run the machines and use powder (TR-15), making a daily log of what was done with drilling reports and powder reports, approving the daily work list of men, writing accident reports and break-down reports (TR- 392) and dealing with the government officials of Iran. (TR-393)

As to the condition of Appellee prior to the September, 1963, incident, even Appellee admitted he had some preexisting disabilities:

"Q. As I understand your counsel, he asked you if by May, before the tunnel fire you had any disabilities?

"A. Had any disabilities?

"Yes, that is possible, that is a chronic condition which has to have existed for some years. While one cannot be dogmatic about the number of years, it is very possible that this relates to the extent of ten years previously." (TR-334)

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As to the condition of Appellee prior to the September, 1963, incident, even Appellee admitted he had some preexisting disabilities:

"Q. As I understand your counsel, he asked you if by May, before the tunnel fire you had any disabilities?

"A. Had any disabilities?

"Q. Yes, and you said no, none that prevented you from doing your work; is that correct?

"A. If he was referring back to the accidents I had had before, I had some disability ratings on those?

"Q. That is what I wanted to clarify.

"A. No, I didn't.

"Q. You didn't mean you haven't had these disabilities?

"A. No, I didn't mean to say I hadn't been hurt before and had some disabilities." (TR-97)

Following the above testimony, Appellee stated after the fusion operation in 1948 he couldn't bend over too far and could "touch his knees pretty good." (TR-98)

B. THE INCIDENT AND DISABILITIES FROM THE ACCIDENT OF SEPTEMBER, 1963.

There is no dispute as to the fact that while the accident and disability policy was in effect Appellee suffered an accident on September 9, 1963, on the El Colegio Tunnel job near Bogota, Colombia. As set forth in Appellee's own words at TR-22-24, Appellee had taken the shift for one of his co-shift bosses who had to be gone, and was on the ground going around to the other side of the jumbo to check on drilling where about fifty gallons of hydrocloric oil had been spilled from a loose hose. He stepped in this oil and

"My feet flew out from under me and I fell backwards and hit my neck on a piece of steel that we call a collar brace . . ." (TR-23).

He ended up in a semi-reclining position and did not in-

jure his arms or legs. (TR-52) He was not unconscious, but did notice pain in the back of his head and his neck and shoulders. He sat on some timber in the tunnel until lunch time when he caught a motor and rode outside, went to the first aid building and then to his quarters. The next morning he went to Bogota to see a doctor. He was placed in the hospital for some two weeks where he received pain medicine and physical therapy. He stayed in his quarters at the job thereafter visiting the doctor in Bogota about once a week, and returned to the United States about October 23, 1963. (TR-25, 28).

In the various histories that Mr. Thompson gave the number of doctors that diagnosed him, it appears that his only complaint from the September 9, 1963, accident was of headaches, neckaches and associated shoulder pains. He did not give a history of any other complaints to Dr. Burton. (TR-106) Likewise, after two examinations by Dr. Manley Shaw, an orthopedic surgeon, it is specifically stated that he did not have any complaints in his lower extremities until after February of 1964. (TR-194) Likewise, Dr. Edward Kiefer, a neurosurgeon of Boise, Idaho, and the surgeon that did the cervical laminectomy on February 28, 1964, states the history given him by the Appellee prior to the February myelogram and operation were complaints of limited motion and pain in the cervical spine, diminished sensation of the index and fourth finger of the left hand and pain in the head, neck, shoulder and left arm. (TR-290-291) He did not complain of any pain in the low back or legs, other than telling Dr. Kiefer about the 1948 lumbar disc operation. (TR-308)

By the verified complaint, Appellee alleges the Sep-

tember 9, 1963, accidental injury to his spine caused "immediate, total disability." (R-11). Likewise, the proof of loss form, TR-85, Exhibit 3, states the date of the accident for which disability is claimed is shown as September 9, 1963. The attending physician's statement attached to the proof of loss in the same exhibit states the injury was:

> "Fractured C-7 Spinus process; ruptured cervical disc."

Again the date of the accident for which the claim is made is September 9, 1963.

The result of the accident of September 9, 1963, is quite certain despite considerable confusion caused by Appellee's primary witness, Dr. Jerome K. Burton. Both in the statement of physician with the proof of loss, dated September 8, 1964, and Dr. Burton's letter of September 9, 1964, (Exhibit 19, R-78), the inability of Appellee to return to work is based upon ". . . the ruptured cervical disc." Thus six months after the operation performed by Dr. Kiefer and after at least eight visits to Dr. Burton by Appellee, his diagnosis is based upon a fracture of the spinus process of the C-7th, a ruptured cervical disc, and the fact that Dr. Kiefer had removed such cervical disc at the C-7th level. Dr. Burton admitted that if there had been a ruptured disc the disability of the Appellee would have been much more severe, (TR-413) and admitted that he did not know even a year after the injury that in fact it wasn't a ruptured cervical disc (TR-414 L13). This was despite the fact that there are ample records in the hospital of notes of the operation as well as other examinations by Dr. Shaw on July 21, 1964, who through use of the x-rays and myelograms pre-

viously taken correctly diagnosed the injury. (TR-177, 179). Another physician of the Appellee's, Dr. Franklin David, who examined him in January, 1965, easily determined that the Appellee had had a laminectomy, an operation removing a portion of the posterior arch of the vertebrae, not the disc. (TR 210) Yet, when Dr. Burton was asked if the fact there was no ruptured cervical disc involved made any difference in the amount of the disability, all he would give was a wisecrack. (TR-414, L19)

The actual facts of the injuries suffered were brought out by Dr. Edward Kiefer, who treated Appellee at the request of Appellee's counsel (TR 291). He examined the Appellee on February 20, 1964, and promptly sent him to the hospital for a myelogram study, which was performed the next day. This was after Dr. Burton had seen the Appellee numerous times. (Exhibit 3) Dr. Kiefer, after medical school and training at the Mayo Clinic, has a degree of Master of Surgery in neurological surgery from the University of Minnesota, being a member of the American Medical Association, the Harvey Cushing Society, and the Board of Neurological Surgery (TR-102, 289-90). Summarizing Dr. Kiefer's findings, he determined that prior to surgery there was localized tenderness in the C-6th level, Appellee was uncomfortable in flexion of the cervical spine and very uncomfortable on extension and lateral rotation to the left of the cervical spine. He found no other deviations from normal in the neurological examination except definitely diminished sensation of the index, middle and fourth finger of the left hand. (TR 291-292) The myelogram was performed at his request and interpreted by the radiologist with findings consistent with the small disc

protrusion from the left at the C-7th level and possibly one level higher on the right side. The radiologist did not find any fracture of the spinus process of the C-7th or other cervical vertebraes, nor did Dr. Kiefer in the operation find any fracture. (TR 293-4) Likewise, Dr. Manley Shaw, a member of the American College of Surgeons and a diplomat of the American Board of Orthopedic Surgeons (TR 176), from x-rays and the record of the previous examination did not find any evidence of fracture (TR 177, 179). Dr. Kiefer made a complete neurological examination and only on the biceps reflex (concerning the nerve root emerging between the 5th and 6th cervical vertebrae) did he find the left side a little less than the right side. (TR 192)

Because of the diagnosis of possible disc protrusion, surgery was performed on February 28, 1964, by the removal of sufficient lamina tissue to create a "window," and the lamina of C-7 and the inferior portion of the lamina of C-6 were removed, carried out far laterally to decompress the nerve root at the foramem. At the time of the operation, Dr. Kiefer found:

> "Anterior to the nerve root . . . this is in front of the nerve root . . . at this level (C-7th) there was a hard disc protrusion— and I should have put this in quotation marks—actually it was accompanied with osteophyte formation in the area. In order to have removed this disc adequately, it was felt there was too much traction would have to be exerted against the nerve root or against the spinal cord. It was therefore felt that a decompression was the treatment of choice. In other words, what we did was to take one jaw of the vice away from the nerve root." (TR-297).

"Q. Now, Mr. Thompson spoke in relation to the osteophyte on the nerve pressure.

"A. It is very definite that he did have an osteophyte at the C-6-7 level.

"Q. This would create more or less pressure on the nerve?

"A. More.

"Q. Would it be in association with the lamina pressure or in addition to it?

"A. Actually it would have no relationship to the lamina . . ." (TR-300)

"Q. Now in Mr. Thompson's case Dr. Kiefer, when you went in and operated you found this osteophyte—what I am trying to get at is what is the relationship of the symptoms of the pain that Mr. Thompson felt and the, first, disc portrusion and, secondly, the existence of the osteophyte?

"A. Well, it must be assumed that the osteophyte was a preexisting condition." (TR-300)

It will be noted that the doctor did not find a fresh disc protrusion, but a "hard disc protrusion," as well as the osteophyte formation in the cervical spine. The evidence is uncontradicted that an osteophyte takes a number of years to be formed and could not be the result of the accident of September 9, 1963. It is a part of the wear and tear form of arthritis. (TR 299) The preexistence of the osteophyte condition leads to the question of the preexistence of the "hard" protrusion of the disc. Dr. Manley Shaw as Appellee's witness stated on this matter:

"He had had, of course, I think two other previous

neck injuries. The disc as it was found in the operation was not a fresh, acutely herniated degenerated disc, but more or less a boney fibrous ridge that indicates this probably accumulated over a fair period of time." (TR 203)

This was likewise confirmed by Dr. Ernest Wood Mack of Reno, Nevada, who stated that as to the osteophyte formation found by Dr. Kiefer in 1964 relating back to the 1953 accident:

"Yes, that is possible, that is a chronic condition which has to have existed for some years. While one cannot be dogmatic about the number of years, it is very possible that this relates to the extent of ten years previously." (TR 334)

Likewise, Dr. John Raaf, commenting with reference to the opinion of Dr. Mack that in 1953 there appeared to be a nerve root compression syndrome at the C-7th level and as to the findings of Dr. Kiefer in 1964 of the disc protrusion on the left side between C-6 and 7 and on the right side between C-5 and 6, that:

"I would think that the prior injury would have some effect on his symptoms for which he was operated upon in Boise." (TR 366)

Further, Dr. Raaf testified that:

"It is difficult to deny that the trauma or the injury to his neck which he sustained on September 9, 1963, didn't aggravate the osteoarthritis. To answer your question more specifically, I think the osteoarthritis is almost totally responsible for his neck symptoms. Had he not had the arthritis I think his neck symptoms would have quickly subsided.

"Q. And would it be your opinion or would it not, Dr. Raaf that the previous injury in 1963, even though it was to the left side, and the injuries in 1960 and September of 1963 to the left (right) side, would have increased the amount of arthritis, the earlier ones, or had any affect on it?

"A. It could have increased, and it probably did increase the arthritis." (TR 373)

The evidence was uncontradicted as to the existence before September 1963 of both the hard protruding disc and the osteophyte growth at the C-6 and 7th levels. Between the accident and the cervical laminectomy operation, there had been some progression of the symptoms in the left arm and fingers, and the operation relieved both the headaches, diminished the pain in the neck, and reduced any numbness in the left arm and fingers. Thus Appellee's witness, Dr. Shaw, stated:

"Well, prior to the surgery, he was apparently having progressive neurological problems and persistent severe pain. His persistent severe pain in the cervical area and the apparent progress of the neurological changes in his hand were stopped, although he still has persistent numbness in the fingers and pain in the neck and shoulder area but of a much less degree." (TR 204)

"I found no evidence of sensory loss, no evidence of atrophy, no evidence of circulatory disturbance." (TR 177)

"Q. Now with reference to any numbness he has in his left arm, did you find any significant numbness on his last examination?

"A. He seems to have less ability to perceive pain-

ful sensation of pinprick or pin scratch over the area of the thumb and index finger.

"Q. Would this or would it not affect his use of his muscles except for the separate set of nerves as I understand it?

"A. Well, they are the same nerves, but there seems to be no motor impairment, that is, there is no atrophy of the small muscles of the hand and he had no apparent difficulty in rapid motion. This might impair finer functions of the fingers, such as picking up very small objects like a pin or tying his shoe laces and that sort of thing.

"Q. With his left hand?

"A. Yes.

"Q. Do you find any such limitation in his right hand?

"A. No sir.

"Q. He would be able to do the finer things with his right hand?

"A. Yes." (TR 191)

Dr. Kiefer's last examination of the Appellee showed the only residual from the cervical spine matter, as far as objective symptoms, was some hypothesia in the left hand fingers (TR 305), and that his cervical spine injury did not disable the Appellee from his employment. (TR 307). Appellee's witness, Dr. Shaw concluded to the same end in stating that:

"Q. If Mr. Thompson on September 9, 1963, Dr. Shaw, had been as normal as anybody that age is, let's say, would this fall and the injury to his cervical

spine cause total disability from what you have seen from him?

"A. Yes, I think so, considering the other problem that he had.

"Q. I am trying to eliminate the other problems and ask you separate from this.

"A. Yes, I think he would have been totally disabled, I mean had he not had surgery afterwards. I think he got considerable relief from the surgery." (TR 203-204)

"A. In other words, you are asking me if the injury of September 9 alone would have prevented him from returning to his previous occupation after surgery?

"Q. After surgery, yes.

"A. Well, there again this is difficult to answer because one of the primary things, I think, is the amount of pain and the individual's tolerance to pain with it. The physical examination and the x-ray evidence is not sufficient as far as limited motion and neurologic deficit is concerned to completely disable him. The only residual injury which he had or the only injury that he did have apparently is herniation or fibrosis of the disc which we assume is a result of the injury because his pain started then. Limited motion in the neck and residual discomfort in the neck, I think, are compatible with some heavy labor. This would depend to a certain extent on just what type of heavy labor he had to do. I would think any type of labor that involved turning his neck a lot and looking up overhead and lifting at the same time

would be particularly troublesome and might be disabling.

"Q. But it wouldn't in itself prevent him from returing to work if the other factors had not existed?

"A. I don't believe so, no." (TR 205)

C. ADDITIONAL ACCIDENT AND DISABILITY OF FEBRUARY, 1964.

Prior to the cervical operation, as noted above, a diagnostic myelogram was performed. Exhibit 6, the St. Alphonsus Hospital records commencing February 20, 1964, show that prior to going for a myelogram Appellee had had some empirin compound No. 3 and went up for his myelogram at 8:40 on February 21. He was there perhaps 45 minutes and was returned to his room before noon. (TR 55) After he had returned to his room and had been lying flat two hours or so Appellee contends he got out of bed to go to the bathroom and was immediately struck by pain from his hips down to his ankles, to the extent that at first he thought he was paralyzed. He had to hold onto the bed and reach over and get the bathroom door and hang on to things in the bathroom coming and going. (TR 32). He claims to have had the same pain continually since that time. Appellee stated:

"It was when I first got out of bed and stepped to my feet down on the floor and stood up is when the pain hit me." (TR 56)

"Q. In other words, you didn't feel this pain while you were lying there in bed?

"A. No, I didn't feel the pain until I got up and stood up.

"Q. Did the pain when you stood up at that time affect your neck?

"A. Affect my neck?

"Q. Yes.

"A. No. sir, I don't think so.

"Q. Now, after you got back in bed, did you have occasion to call a nurse or call a doctor?

"A. Yes.

"Q. How soon?

"A. I called nurse and talked to her and asked her what would cause that pain like that and she said she didn't know.

"Q. Did you call your doctor?

"A. No, I didn't call the doctor. They told me that the doctor would be in to see me later." (TR 57, 58)

"Now, Mr. Thompson, between the date of the myelogram on the 21st of February and when you had your operation on the cervical spine on the 28th, which was hurting worse, your legs or your neck or shoulders?

"A. Well, I believe my legs hurt the worst because I did take the pain medicine for the pain in my neck and shoulders.

"Q. It would relieve that pain but not your legs?

"A. It was strong enough to relieve it yes."' (TR 59)

Exhibit 6, the hospital records, contradict appellee's statements. Dr. Burton was asked to review the record

for the 20th, 21st and 22nd, in relation to the alleged onset of the leg pains. He could find nothing but a headache noted, admitted that after a myleogram a headache and perhaps a backache around the point of injection was normal, and admitted that it was certainly usual that if the Apellee had a sudden onset of pain, called the nurse and told her about, that the same would be entered on the record. (TR. 156-158) Dr. Kiefer was asked to examine the same exhibit for the period after the myelogram as to whether there was anything abnormal which would indicate a recation to the myleogram. He stated there was not, and that if the appellee had had a violent reaction to the myelogram, quite likely he would have had increased temperature of at least 100 degrees, from an inflammation reaction with a corresponding rise in his pulse. He further stated that any reaction to the myelogram should show up in the first 24 hours, or by 48 hours at most, none of which temperature, pulse or other record is shown on the hospital records. (TR 295-96.) Further, Dr. Kiefer, as the operating and attending physician following the myelogram stated he had no independent recollection of any severe pain reported to him by the appellee following the myelogram. (Tr. 310.)

Appellee's witness, Dr. Shaw, likewise reviewed the record of the hospital and to the question of whether the chart confirmed in any manner appellee's testimony as to extreme pain in his lower extremities after the myelogram, stated he did not find any indication of such in the way of pulse, temperature or remark of nurses that indicated this. (Tr. 187.) He specifically testified that if appellee had had such sudden and severe pain which he reported to the nurses, that it would be customary to have it written down on the

chart. (Tr. 188.) As to any entry concerning pain in the lower extremities, Dr. Shaw, as well as the other doctors, could only find an entry at 10:30 in the morning of February 25th, stating, "resting, states funny pain in left arm and leg, leg pain felt after myelogram is gradually diminishing." (Tr. 195, Exhibit 6.) Then the following day at 9:00 o'clock at night there is an entry that he complained of "aching pain in the left leg." Tr. 195.

Dr. Shaw further examined the record to determine whether there was any particular medication given which would indicate severe pain. His testimony at Tr. 196-7 shows the appellee complained of a headache after the myelogram, which is fairly common, and was given empirin compound No. 3 at 1:30 p.m. following the myelogram. He likewise received the same compound at 11:00 p.m. that night and at 2:00 a.m. on the 22nd. Further, at 3 a.m. on the 22nd, the date following the myelogram, he complained of severe headache and distension of abdomen and hiccups. He was given an enema. It was not until 2:45 on the following day, the 23rd, that he received the next pain medication and no pain medication was given on the 24th. On the 25th he received the same compound at 11:30 in the morning, and at 9:30 that night complained to the nurse of an aching pain in the leg above noted and was given the same compound. On the 26th he was given the same compound at 9 o'clock in the morning. That same night he received the compound at 10:00 o'clock and at 10 a.m. on the morning of the 27th received the same compound for constant dull ache in the neck. At the same time, of course, he complained of numbness in the middle three fingers. At 3:40 that afternoon he was given the same compound, which was

administered again at 9 p.m. that night and at 11:45 also. He went for surgery on the next day, the 28th.

Dr. Shaw, commenting on this record of medication, which he found apparently was empirin compound No. 3 all the way through, stated this was not a particularly strong pain killing medicine, but an effective one, and if the appellee had had severe pain, he probably would have had a hypo administered. (Tr. 200-201.) The doctor notes that the amount of pain compound given was more or less routine. Dr. Shaw finally states:

> "Q. In other words, would you say that from this intermittent medication there was any evidence of severe pain or moderate pain or lack of pain?
>
> "A. Well, this is difficult to evaluate from the chart actually, but this does not indicate he was having extreme pain." (Tr. 201.)

Appellee's testimony was that the disability of the lower extremities was created by the pain, as noted immediately following stepping out of bed after the myelogram and continued unabated down to the present time. (Tr. 57) After the cervical operation, the mild pain medicine would stop the ache that Mr. Thompson reported to continue in his neck and left shoulder, but did not relieve the pain in his legs. (Tr. 43, 59.) The nature of this disability in the legs was consistently reported to the various doctors as pain in the legs, cramping in the legs and being able to walk only about four blocks before having to sit down and rest (Kiefer, Tr. 303) (David, Tr. 210) (Raaf, Tr. 364). It is to be noted that there is some difference in the report of the doctors and that of Appellee in that the charley horse or cramping in the legs apparently

stopped after he stops walking and again develops only upon use of the legs. When testifying as to attempting to work in May of 1964, Appellee made it clear that the legs cramp and hurt much worse when he tries to use them, such as walking three blocks. (Tr. 37)

The nature of the disability of Appellee's lower extremities is uncertain. Appellee's main medical witness, Dr. Burton, examining him August 20, 1964, stated it to be "cramping and aching of muscles in his legs" (Tr. 110), and called it an adverse reaction to the dye used in the myelogram. Yet Dr. Burton admits it is impossible to know whether the Appellee has arachnoiditis without a biopsy of the tissue being done (Tr. 170), and admits there are insufficient symptoms at this time to be certain that it is arachnoiditis (Tr. 174).

Concerning the incident of February 21, 1964, none of the professional witnesses except Dr. Burton claimed its residual result was related to the cervical injury, and none believed that it was arachnoiditis, or was able to confirm the alleged pain and cramping by the existence of any objective symptoms. The onset of the leg disability was sudden and violent. Yet each doctor agrees that any reaction to the myelogram, which is due to irritation to the membranes of the spinal cord, to cause such sudden pain would have to have been associated with reportable marked increase in temperature and associated increased pulse rate, which, of course, did not exist. Dr. Raaf, who has actually published on the subject, (TR 381), testified specifically that at the greatest extreme, you would not expect any pain or discomfort in the lower extremities to last

more than a few weeks as the result of a myelogram (TR 362), that he doubts the myelogram could have triggered the present pain in the legs (TR 362), that any reaction from irritated membranes due to the myelogram is unusual if it does not go away within a few days to a few weeks (TR 377), and that since he had practiced as a neurosurgeon in Portland beginning in 1936 he had only observed one case that he could remember of irritation from myelogram in the legs (TR 371). Even so, he had never seen a case where the reaction to a myelogram came on with severe pain within a couple of hours, within the facts described by Mr. Thompson. (TR 377-78). Dr. Raaf very specifically concluded that Appellee's pain in the lower extremities could not be arachnoiditis from the myelogram and made a differential diagnosis that to the extent of cramping or 'charley horses' from walking, the pain might clearly be indicated to be due from intermittent claudication (TR 363-4). He thought it likely, except for temporary aggravation from the myelograms, to be due to preexisting conditions, particularly in the lower spine from the previous fusion operation. (TR 376, 378, 382).

Dr. Manley Shaw, appearing for Appellee, testified as to the incident following the February myelogram that the ordinary reaction to the myelogram dye is accompanied by severe headaches and elevation of pulse and temperature or respiration pulse (TR 187), and as to the nature of the pain in the legs, testified:

"Q. Are you able to definitely account for the leg pain?

"A. No, sir, this is conjectural.

"Q. Do you have an opinion as to the cause of that pain?

"A. I would judge because of the fact that it is aggravated by forward bending, that possibly the nerve roots are bound in adhesions. Whether this is related to the myelographic study or residual of injury, plus aging, plus postsurgical changes is conjectural at this time." (TR 180-181)

"A. I don't believe the fusion in itself is painful and this seems solid by x-ray at the present time. I don't believe the fusion per se is at fault, but this would seem to be some irritation of the nerve roots probably by scar formation and either progressive as a result of wear and tear, possibly some relation to the irritation of the dye, possibly some relation to the injury itself." (TR 195)

"Q. Now, doctor, in your present examination of him, you were still uncertain as to what the cause of his lower leg pain is?

"A. Yes, sir. In the absence of neurological changes, I believe this pretty effectively rules out the possibility of spinal cord tumor or a progressive arachnoiditis." (TR 186)

Dr. Kiefer in discussing the examinations he made of the Appellee in the summer of 1964 following all of the operations stated he found all of the neurological symptoms in the lower extremities to be normal, and that ". . . it is very unlikely . . ." (TR 307) that the patient could have developed arachnoiditis in a couple of hours after the myelogram ". . . because it takes time to develop scar tissue in arachnoiditis." (TR 307). He thought further the cramping of the legs indicated intermittent claudication (TR 304, 310). Dr. Kiefer

definitely ruled out arachnoiditis, as not verified by the symptoms and as extremely rare (TR 313). Likewise Dr. Coughlin, whose deposition was read by the Appellee, stated:

> "In my examination I considered the possibility of his having arachnoiditis. I felt that very probably he did not have it." (TR 279)

Dr. Shaw stated that the total number of accidents which Appellee had had were a "material" part of his present disability (TR 184), that his loss of hearing of forty-one percent in one ear and thirty-one per cent in the other (TR 184) would make it difficult for him to be alert and avoid dangerous situations (TR 193), and that the disability he found existing in the legs was a material part of the Appellee's inability to carry on his work. (TR 194). Dr. Raaf similarly stated that his previous osteoarthritis accounted for part of his present disability and that without it his neck symptoms would have subsided quickly after the accident (TR 373), that the residual difficulties on the lower legs were due to preexisting conditions (TR 376, 378,) and that the flare up of pain after the myelogram was for the previous operation for which fusion had been done. (TR 361, 362).

In any event, it appears from Appellee's testimony that whatever caused it was sudden, unexpected and apparently severe. Even Dr. Burton agrees that if it was the result of the myelogram it was highly unusual (TR 158) as, of course, did all the other doctors. Stepping out of bed through whatever mechanism acted caused this sudden, unusual and severe result. It is also uncontradicted that this last event, a separate incident, and one happening outside of the insurance

period, has only created a total disability of the Appellee, if he is totally disabled, because of accumulation. Thus, Dr. Burton stated:

> "My feeling on that would be that each succeeding accident, no matter who has it, each succeeding accident is going to leave its toll. There finally has to be one that is the straw that breaks the camel's back." (TR 168)

Dr. Shaw spoke much in the same terms:

> "Q. Doctor, if Mr. Thompson did not have what occurred after the myelogram, whether it is related to it or not I don't know, but if he didn't get this disability he presently has in his extremities, lower legs, would this affect your opinion?
>
> "A. He was working, I gather, in the same capacity as a working supervisor prior to this injury. In other words this seems to be the straw that broke the camel's back." (TR 193, 194)

Again, that the preexisting infirmities causing disability by accumulation with the present disabilities is shown by Dr. Raaf's testimony that the present symptoms in the lower extremities was due to injuries and conditions existing prior to the September 9 fall. (TR 376)

D. WHETHER APPELLEE IS TOTALLY DISABLED

If the injuries of the Appellee are within the provisions of the policy previously quoted, he is entitled to the payment for total disability as follows:

> "After one year of 'continuous total disability'

and if the insured is then 'permanently and totally disabled' the company will pay a permanent total disability benefit . . ."

" 'Continuous total disability' which must result from such injuries and commence within 365 days after the date of accident, means the insured's complete inability during the first year thereof to perform every duty of his occupation."

" 'Permanent and total disability' means the insured's complete inability after one year of continuous total disability as defined above, to engage in an occupation or employment for which the insured is fitted by reason of education, training or experience for the remainder of his life." (R 37, 57; Exhibit 4, TR 57)

The statements that follow concerning whether he was totally disabled, do not concede from what source such disability may have arisen.

Following the cervical operation of February 28, 1964, the evidence is uncontradicted that he received considerable relief from the injuries from the September 9 fall. The evidence is uncontradicted that the laminectomy was the proper treatment, and that the removal of the lamina as opposed to attempting to remove the herniated cervical disc, was the conservative and proper way to handle the injury. There is no atrophy of any of the muscles involved which proves there was no damage to the motor nerves. Only slight damage was indicated to the sensory nerves due to a limited sense of feel on two or three fingers in the left hand and the lower side of the left forearm. Some

degree of limitation of motion in the neck existed, but whether it was due to the accident or preexisting conditions is uncertain.

The other areas of disability concern the major loss of hearing in both ears, a major disability rating concerning the burns on the hands from the fire of May, 1963, the considerable loss of motion in the low back from the 1948 fusion operation, the reduced vital capacity in the lungs, both from the fire of May, 1963, and preexisting conditions of some chronic bronchitis and emphysema and generalized hardening of the arteries and arthritis.

In relation to this health picture, the policy provisions require, after a year of continuous total disability, which is the inability of the Appellee to perform "every duty of his occupation," that Appellee be "permanently and totally disabled." Appellee to be permanently disabled, must be unable to engage in "an occupation or employment" for which he is reasonably suited by education, training or experience. The record shows that for a man of 55 years of age, Mr. Thompson is able to read, although he uses reading glasses, and has no trouble in writing letters and filling out forms. (TR 391.) He has been a supervisor at the intermediate level on heavy construction, supervising anywhere from 30 to 150 men, and has engaged in training men in the operation of equipment he used. He has had experience in South America as well as the near East, including dealing with foreign local officials. He is able to drive a car, he qualifies for a driver's license (TR 68) and is able to get around to such things as visiting for a few days at a cattle camp where his daughter and her husband worked (TR 71).

While living at Leadore in the severe winter, down to 35 degrees below zero, he was able to walk back and forth to the post office, a few blocks, to get the mail (TR 71, 73). He is able to dress and shave himself without any difficulty, other than trouble in getting his shoes and socks on. (TR 73) The evidence further shows the only employment he has tried to carry on since the accident of September 9, 1963, was in May of 1964 when he tried sweeping. Since that time he has made no application for any type of work and just drew unemployment compensation as long as he could (TR 74). He has no difficulty sitting for periods of time. There is nothing in the record that would show within the policy terms that there was no occupation or employment in which he could engage by reason of experience, training or education.

E. OTHER FACTUAL POINTS

The facts concerning other grounds upon which this appeal are based are set forth in the specification of errors or in the legal arguments concerning the individual points of procedure during the trial, instructions and motions.

III

QUESTIONS PRESENTED

The specifications of errors are set forth in Exhibit "A" hereto and made a part hereof. While the questions presented are more fully set forth in the summary of argument hereafter, the basic questions are as follows.

Did the Appellee meet the burden of proof to bring him within the coverage of the accident policy by showing that the bodily injuries caused by the accident of

September 9, 1963, were not within the exclusions of the policy for illness, disease and/or bodily infirmity, etc., and resulting directly and independently of all other causes from said accident?

If Appellee's proof meets said burden, did Appellee meet the burden of proof that after the existence of one year of continuous total disability commencing within 365 days after the accident of September 9, 1963, he was totally and permanently disabled from engaging in an occupation or employment for which he might be fit by reason of education, training or experience?

Was the action of the Court in ruling on evidence during the trial, and in ruling on the motions for voluntary dismissal, directed verdict, judgment notwithstanding the verdict, and new trial prejudicial error?

IV. SPECIFICATION OF ERRORS

The trial court erred in the following particulars:

1. The Court erred in denying the motion of Appellant for a directed verdict in favor of defendant and against the plaintiff, which motion is shown on TR 416-418, and including the grounds set forth on the motion of Appellant for involuntary dismissal as set forth at TR 283-288.

2. The Court erred in denying Appellant's motion for judgment notwithstanding the verdict, which motion is set forth at R 187 through 192, and denied by order of December 8, 1965 (R 217).

3. The Court erred in denying Appellant's alternate

motion for a new trial set out at R 194-200, by order of December 8, 1965, R 217.

4. The Court erred in giving Instruction No. 11, ¶ 2, TR 423, reading,

> "You are further instructed that legal notice and proof of loss were timely made,"

upon the grounds of objection that Appellant requested the wording of Requested Instruction No. 2, R. 155 (TR 423, line 10), both as to the twenty-days notice and as to the ". . . question about when the year actually starts," (TR 423) and the requested instruction desired was:

> "Finally, you must find plaintiff submitted written proof of loss within 90 days after the running of said full year of continuous total disability and after submitting proof of loss, did not commence any action in court until expiration of 60 days after such proof of loss." (R 155)

This was clearly error where the court in Instruction No. 13, ¶2, TR. 435, instructed as an issue for the jury that plaintiff had to prove the 365 days had elapsed after the accident, showing an issue of fact still existed as to whether or not the proof was timely (TR 435). The Court assumed the objection which had been made in prior argument (TR 423), which argument is set forth at TR 286-88, relating fully to whether the 20 days or reasonable time had expired after the loss had occurred and whether there had been an expiration of 365 days before the loss had occurred, before the proof of loss could be filed. This was error because of lack of evidence as to when the proof of loss was filed, and there was a jury issue, in any event, as to inferences

relating to that date and as to whether a full year of continuous total disability had expired; further the instruction totally left out a relationship between whether the full year had run and the date of the filing.

5. The Court erred in refusing to give Appellant's Requested Instruction No. 2, R 155, set forth above in Specification 4, on Appellant's objection as likewise set forth in Specification 4 immediately foregoing. The basis of the objection for not giving said instruction was that the Court did not instruct the jury properly on the relationship between the time for filing of the proof of loss and the expiration of the 365 days of total continuous disability (TR 423).

6. The Court erred in giving Instruction 13, ¶4, TR 436, reading:

> "In order to recover, the plaintiff must prove, by a preponderance of the evidence, as in these instructions defined, each of the following:
>
> ***
>
> 4. That such disability resulted directly and independently of all other causes from bodily injuries caused by the accident."

Appellant objected to this instruction at TR 424, requesting there be added thereto the disease and bodily infirmity portion of the exclusion clause of the policy, and secondly, that it could not include disability caused by another accident following the September 9, accident. These were denied by the Court, on the basis that: "I feel 'directly and independently' must be all inclusive," (TR 424, line 14), which is contrary to the policy wording.

7. The Court erred in giving Instruction 13, ¶¶2 and 3, TR 435-36, reading:

> "In order to recover, the Plaintiff must prove, by a preponderance of the evidence as in these instructions defined, each of the following:
>
> ***
>
> 2. That the plaintiff became, continuously for three hundred and sixty-five days after said accident, so disabled as to be completely unable during said period to perform every duty of his occupation.
>
> 3. That the plaintiff became, within three hundred and sixty-five days after said accident, totally and permanently disabled from performing in the usual and customary manner an occupation or employment for which he is fitted by reason of his training, experience or education for the remainder of his life."

Appellant objected:

> "I think paragraph 2 of 13 and 3 should state the two differences. Paragraph 2 should be continuously totally disabled for the first year after the disability and paragraph 3 should be total disability thereafter." (TR 421)

Instead, paragraph 2 speaks of the three hundred sixty-five days without noting the proof of loss must come "after" it, and more seriously in paragraph 3 states the total and permanent disability can commence "within three hundred sixty-five days after said accident," which is contrary to the policy that it can only occur after said time.

8. The Court erred in failing to give Appellant's

Requested Instruction No. 4, R 157, which reads as follows:

"I instruct you that the accident insurance policy which plaintiff is covered by does not cover losses or disabilities which are brought about either directly or indirectly, in whole or in part, caused by or resulting from any illness, disease, bodily infirmity or bacterial infection other than one as a consequence of a cut or wound in the accident. The policy insures only against disabilities resulting directly and independently of all other causes from bodily injuries caused by accident. I also instruct you that said policy of accident insurance would not insure plaintiff against any other accident occurring to him outside of the time the policy existed, September 1, 1963, to October 31, 1963.

I further instruct you that before you may find for the plaintiff, you must find that any disability which plaintiff presently suffers falls within the coverage of the policy. I instruct you that the term 'bodily infirmity" as used in the policy means something more than minor and passing or transient disabilities which leave no permanent effect, but does include the disabilities which plaintiff suffered, if any, from previous accidents, illnesses, and supersusceptibility or allergies to drugs unusual to the average person. Such exception does include disease, which I instruct you is defined as an illness or sickness and includes a disturbance of any function or structure of any organ or part of the body. The exclusion, however, does not include a disease caused directly by the accident itself.

Therefore, if you find from the preponderance of

the evidence that a disease or bodily infirmity existed as herein defined, and said items contributed, in whole or in part to the disability of plaintiff, you may not find for the plaintiff."

The error in failing to give this requested instruction is noted in the immediately foregoing specification, as being a misinterpretation of the policy to leave out the excluded items in determining the coverage of it from an accident.

9. The Court erred in giving Instruction 15, TR 437, as follows:

"You are hereby instructed that the term 'accident' as used in the policy is defined as an act which is not natural or probable and should not reasonably, under all the circumstances, have been foreseen."

Appellant objected on the grounds that the definition of accident given deleted the last clause of Requested Instruction No. 5 and the Court refused to reinstate that deletion (TR 425). The grounds of the objection are that the definition as given is quoted from the Idaho Supreme Court Opinion in *O'Neil v. New York Life Insurance Company*, 65 Idaho 722, 152 P.2d 707 (1944).

10. The Court erred in not giving Appellant's Requested Instruction No. 5, R 158, as follows:

"You are hereby instructed that the term 'accident' as used in the policy is defined as an act which is not natural or probable and should not reasonably, under all of the circumstances, have been foreseen, and is tragically out of proportion to the trivial cause."

The last clause of this was requested to be inserted in the instruction, and was specifically rejected (TR 425). The grounds for its being inserted are given in Specification 9 immediately foregoing.

11. The Court erred in giving Instruction 16, TR 437, as follows:

> "Evidence has been received of injuries suffered by the plaintiff prior to the accident of September 9, 1963. You may consider this evidence in determining whether or not the disability claimed by the plaintiff resulted directly and independently of all other causes."

Appellant objected that this instruction was inadequate because it left out the exclusion words of the policy and requested that they be added. The Court rejected the same (TR 425). These exclusionary words should have been incorporated herein in order that the jury would have the correct definition of the policy's coverage.

12. The Court erred in rejecting Appellant's Requested Instruction No. 6, R. 159, as follows:

> "I instruct you that even though you may believe from the evidence the plaintiff suffers disability from the cervical spine injury of September 9, 1963, yet, if you further find from the evidence that the present disability suffered by the plaintiff results from a combination, concurrent and working together with disease or bodily infirmity not caused by the accident of September 9, 1963, whether existing before or after the September accident, the court then instructs you that you cannot find for the plaintiff in this case, because the disabilities of the

plaintiff, if any, are not within the terms of the policy."

This was rejected by the Court's notation on the record, R. 159, and is included in the request of Appellant in objecting to Instruction 16 because of the words left out of such instruction. It includes also the running objection of the Appellant referred to by the Court at TR 423, lines 21-23, and included Appellant's objections as noted in TR 424, lines 9-11. The request should have been granted in order to advise the jury of the relationship of the accident of September 9, 1963, and the prior or later diseases and bodily infirmities.

13. The Court erred in giving Instruction 17, TR 437, reading as follows:

> "If you find that the plaintiff suffered an accident on September 9, 1963, resulting in injury to his cervical spine, you are instructed that the plaintiff was under an obligation to submit to reasonable medical treatment in order to alleviate the injury and minimize the possibility of any disabling effects therefrom."

Appellant objected to this instruction at TR 425, stating: "There must be added to it that the Appellant is not responsible if in normal treatment bizarre and unusual results occur," but the Court rejected the request. As Appellant clearly is not liable for unusual results of medical treatment, or for unrelated accidents that may have happened during medical treatment, the instruction is misleading without the additional provision.

14. The Court erred in rejecting Appellant's Requested Instruction No. 8, R. 161, as follows:

> "If you find from the evidence that Plaintiff did sustain an injury to his neck on September 9, 1963, as alleged, and that thereafter in the treatment of such injury he was given a myelogram on February 21, 1964, after which he suffered a violent, unusual, unexpected and untoward result which caused disability in the lower extremities of plaintiff, which contributed and joined with the neck injury of plaintiff to cause his present disability, in such event plaintiff is not entitled to recover and your verdict should be for the defendant.
>
> "If you find, however, from all the evidence, that the myelogram did not result in any unusual, untoward or unexpected results in causing the disability of the lower extremities and that such disability as a result of a myelogram could be reasonably expected to develop as a result of the injury to the neck, and was not due to any disease or infirmity of plaintiff, then I instruct you that the development of the disability to the legs as a result of the myelogram are neither causes of the injury nor disease or bodily infirmity excluded from the coverage of the policy, and you may hold a verdict for the plaintiff."

Appellant objected to the failure of the Court to include the provisions of the first paragraph of Requested Instruction 8, in both Instructions No. 17 and No. 18, TR 425, dealing with normal medical treatment in relation to the cervical spine and the myelogram being necessary to deal with the injuries of the cervical spine. Specifically in objecting to Instruction 18, the Appellant requested there be added to it word-

ing that "If the result then is unusual and bizarre, it would not be within our responsibility." (TR 425, line 24.) These requests were in effect the wording of the requested instruction and were required by Idaho law concerning the results of medical treatment.

15. The Court erred in giving Instruction 18, TR 437-8, as follows:

> "If you find that in February, 1964, the plaintiff underwent myelographic studies and a surgical operation of a cervical spine and that such myelographic studies and surgical operation were from a medical standpoint necessary to deal properly with the effects of the injuries suffered by the plaintiff on September 9, 1963, and if you further find that the effects of either the said myelographic studies or surgical operation resulted in or contributed to plaintiff's present disabilities, you are instructed that the consequence following from the myelographic studies and the surgery are to be regarded by you the same as though they had followed the injury of September 9, 1963, without any intervening medical treatment or surgery."

Appellant objected to this in total (TR 425), and requested the additional provisions noted in the immediately foregoing Specification as to unusual and bizarre results from treatment. It is contrary to law to hold the Appellant liable within the policy for unexpected and unusual results of even normal medical treatment, aside from ones which may be caused by preexisting disabilities.

16. The Court erred in refusing to give Appellant's

Requested Instruction No. 7, R. 160, reading as follows:

> "I instruct you that even though you may find from a preponderance of the evidence that the Plaintiff is permanently and totally disabled at the present time, nevertheless you must further find from what sources said disability arose. Testimony has been presented in this case that Plaintiff suffers from disability arising from injuries suffered from the accident of September 9, 1963, during the period in which the accident policy existed and from an event which the jury could find to be an accident, and testimony has been presented that the present disabilities of the Plaintiff, if any, could also have come from causes excluded from the coverage of the policy; and testimony has been given from which the jury could find that the present disability of Plaintiff resulted from a combination, concurrence, and working together with causes from the September 9, 1963, accident within the coverage of the policy and causes excluded from the policy.
>
> Therefore, the Court instructs the jury that if you find as a fact that the disability of the Plaintiff resulted from a combination, concurrence and working together of causes within the coverage of the policy of insurance and causes excluded from the coverage of the policy of insurance, the court instructs you that Plaintiff is not entitled to recover in this action."

This is the basic matter which was urged upon the Court in each instance relating to the 'directly and independently of all other causes' clause, and rejected each time by the Court. (TR 424, lines 10 and 14) The jury was not properly instructed to consider whether or not the reaction to the event of February 21, 1964,

was a normal and usual thing or a violent, unsual and unexpected thing. The law required that they be so instructed. The Court rejected it by so marking it.

17. The Court erred in Instruction No. 10 in ¶ 2, TR 433, reading as follows:

> "The Defendant denies that Plaintiff is entitled to the benefits of the policy, contending that Defendant is not totally and permanently disabled; that even if he were, such disability did not result directly and independently of all other causes from bodily injuries caused by any accident occurring while the policy was in force. Defendant contends that disability, if any, arose in part from preexisting bodily infirmities of Plaintiff. Alternatively, Defendant contends that if the result of the diagnostic treatment of the Plaintiff on February 21, 1964, by way of a myelogram, materially contributed to plaintiff's disability, that such event constituted an accident and that such accident occurred after the insurance coverage was discontinued."

Appellant objected that it was not the diagnostic treatment, it was the unusual result which was contended to cause the disability, to which the Court said: "I will put those words in." (Tr. 422, lines 18 and 23) Appellant also objected that the instruction used the word that the event constituted "an accident" and there was confusion as to which accident might be referred to. Appellant requested an additional word "another" accident. The Court denied this. (TR 423, line 4) It was material error to mislead the jury in stating the Appellant's contentions were that the myelogram materially contributed to the disability.

18. The Court erred in rejecting evidence offered on behalf of Appellant, to wit:

(a) Appellant asked Appellee under cross-examination what he received in pay while working on the Iran job. Appellee's counsel objected that it was not material or relevant. (TR 389) The Court sustained the objection (TR 390) Appellant made an offer of proof quoting from a previous deposition of Appellee, which offer was rejected by the Court without further objection from Appellee's counsel. (TR 396) The evidence shows a substantial salary was received by Appellee, and this was material and relevant in judging the ability of the Appellee to carry on other work. It clearly showed his abilities were not related mainly to manual labor as was sometimes implied in the case. It was material error.

(b) Appellant asked Appellee on cross-examination if he was still of the opinion as set forth in the verified complaint, Exhibit 12, that his present disability arose immediately after the accident of September 9. Appellee's counsel objected without stating any grounds because of the Court's interruption and the Court sustained the objection. (TR 85-86) Verified pleadings certainly can be used to impeach or refresh the memory of a witness, and preventing the Appellee from answering was material error.

(c) Appellant asked the Appellee to read Exhibit 10, the amended claim to the Industrial Accident Board of the State of Idaho as to the 1963 injury, and as to paragraph 7 on page 3 to say whether he still agreed with what was set forth there. Appellee objected without stating any grounds because of the interruption of

the Court (TR 84, line 21), the Court stating the grounds he wanted and requesting the Appellee to make objection on those grounds. Appellee did so and was sustained. (TR 85) This was substantial error as the pleading of the Appellee on the same accident in a different form which substantially and materially contradicted his present testimony was certainly proper at least for impeachment purposes. The Industrial Accident amended claim clearly set forth that the present disability of the plaintiff was in part an accumulation from prior accidents.

19. The Court erred in admitting into evidence Exhibit 20 offered on behalf of Appellee, a report of medical examination made by Morrison-Knudsen Co. for its own purposes. Appellant objected that because of lack of identification by the person having control and custody of it, it was hearsay (TR 244), that it was prepared wholly in relation to other matters not binding on Appellant and was irrelevant and immaterial (TR 245), and that there was no evidence that it represented the complete report of the doctor as it may have existed in the files of the company (TR 246). The Court admitted the exhibit after the Court remarked three times to the effect that Appellant's objections were going to make the Court have to take a recess to find the proper officer, after the Court commented on the contents of the exhibit, and after the Court asked the witness questions trying to lay a sufficient foundation for placing it in the record. Further, no evidence was offered as to the position of the medical examiner with the company or the procedure by which the document reached the files, if it did, of the company. Appellant was prejudiced by the content of the exhibit, the Court's comment upon its content to the

jury, and the Court's remarks to Appellant concerning objecting to it.

20. The Court erred in rejecting exhibits offered on behalf of Appellant, to wit:

(a) Appellant offered Exhibit 12, the verified complaint, particularly paragraph III thereof. Appellee's objection gave no ground, but the Court sustained the objection raised and provided the grounds as irrelevant and incompetent. (TR 86) Appellant offered it to show prior inconsistencies.

(b) The Appellant offered Exhibit 10, paragraph 7 thereof, which exhibit was a copy of the amended claim of the Appellee to the Industrial Accident Board of Idaho concerning the Sepember, 1963, injury. Appellee commenced to state an objection, the Court interrupted and provided the basis for it, and then sustained the same. (TR 84-85) Authenticity was stipulated, and the document was relevant and material as it related to the same accident involved in the case, and certainly was material for impeachment purposes on a prior inconsistent statement.

(c) The Appellant offered Exhibit 8, 9 and 11, being respectively documents concerning the 1960 industrial accident, the 1962 industrial accident, and the 1953 industrial accident of Appellee, giving the lump sum settlements and other details of disability in each case. (TR 82) The Court had already stated that he did not believe the records were pertinent (TR 81, line 15) and that "We have your objection to this entire line of testimony, but with that objection in mind can we get an agreement as to the percentage of disa-

bility?" (TR 81, line 33) Counsel then objected that they were hearsay, even though it is stipulated they are authentic (TR 81, R. 62-63). The Court rejected these documents, and that is error despite the fact that the percentage of disability was stipulated, in that the details of the accident and the actual award were not before the jury.

21. The Court committed substantial error by not maintaining an impartial attitude during the trial as to such matters as: stating the grounds of objection for the Appellee (TR 86); interrupting Appellant's questions before an answer could be given and commencing asking them himself (TR 50); interrupting Appellant's cross-examination of Appellee purportedly to keep out in advance otherwise inadmissable evidence and without objection by Appellee's counsel (TR 50); cutting off a preliminary objection by Appellee to state the grounds he believed would be proper for such objection with the request that Appellee make such objection (TR 84); suggesting to Appellee's counsel how to reword an objectionable question without sustaining Appellant's objection to it (TR 117-118, 405); interrupting Appellant's cross-examination of a doctor with reference to questions asked two or three questions back and stating the question was not a fair one when no objection had been made by Appellee (TR 192-193); suggesting to Appellee's counsel that he ought to explore a little further the question of foundation for admission of an exhibit after Appellant's objection (TR 241, line 9); in relation to Exhibit 20, criticizing Appellant's objections for delaying the trial by asking that a proper person identify the exhibit, participating actively in trying to qualify the exhibit for admission by asking questions, commenting on the

exhibit's content, and suggesting to Appellee how to proceed (TR 244-246); and participating in the questioning of one of Appellee's witnesses by restating the Appellee's question (TR 241, line 18), not ruling on Appellant's objection to the question and rewording it for the Appellee (TR 241, line 25). Because the Court did not give the same aid to Appellant and its witnesses, it was clear to the jury that the Court was critical of Appellant and favorable to the Appellee. He did not maintain an impartial attitude by his one sided participation in the trial.

22. The Court erred in interpreting the accident insurance policy under the "directly and independently of all other causes" clause as including the exclusions of losses caused by or resulting from illness, disease or bodily infirmity, thus denying the motion for directed verdict and for judgment nothwithstanding the verdict on the theory proximate cause had been proven whereas the policy required sole cause if the excluded items were involved.

23. The Court erred in not granting the motion for new trial based upon the errors set forth herein in Specifications 4 through 21, and for trying the lawsuit on the incorrect theory as to the "directly and independently of all other causes" clause, leaving out the exclusionary provisions of the policy in the jury's consideration.

24. The Court erred in denying the motions for a directed verdict, for judgment notwithstanding the verdict, or in the alternative for a new trial in that Appellee did not establish proof of loss was made after

the three hundred sixty-five days of continuous total disability from "such injuries" which could only refer to those resulting directly and independently from all other causes and not within the excluded items, the evidence being uncontradicted that pre-existing disease and bodily infirmity contributed to his condition during the first year and that the event of February 21, 1964, was a new efficient and intervening cause within such definition. Further, no written proof of loss was filed in accordance with the provisions of the policy within ninety days after the loss, which was a condition precedent to recovery and which loss had not occurred at the date of the filing, as argued to the Court on motion for involuntary dismissal (TR 285) and directed verdict (TR 416).

25. The Court erred in not granting the motion for directed verdict or the motion for judgment notwithstanding the verdict in that there was insufficient evidence to determine the date the notice of claim or the proof of loss was filed with Appellant, which filings were condition precedent to action herein, the only matter of record being the pre-trial order that they were received "on or about" September 9, 1964. This was argued to the court on motion for involuntary dismissal (TR 287) and on motion for directed verdict (TR 416).

26. The Court erred in denying the motions for a directed verdict and for judgment notwithstanding the verdict in that the evidence was insufficient for the jury to be able to determine that Appellee was permanently and totally disabled within the definition of the policy and that such disability existed after one year of continuous total disability, the evidence being

uncontradicted that none of the doctors was willing to say that wholly apart from the pre-existing bodily infirmities and wholly apart from the disabilities from the February, 1964, incident, Appellee was totally disabled. This was argued in motion for directed verdict (TR 416), including grounds argued for involuntary dismissal (TR 285), and in the argument on the motion for the judgment notwithstanding the verdict.

27. The Court erred in denying the motions for involuntary dismissal, directed verdict and judgment nothwithstanding the verdict in that the evidence conclusively shows the substantial degree of the Appellee's present disabilities were related to the incident of February 21, 1964, when Appellee stepped out of bed, in that such results were due to a highly unexpected, unusual, and severe reaction tragically out of proportion to its cause, so as to be considered an accident, and that said disability resulting therefrom could not be within the definitions of the insurance policy. This was argued to the Court on motions for involuntary dismissal at TR 285, directed verdict at TR 416, and judgment nothwithstanding the verdict at R. 187, et seq.

28. The Court erred in denying Appellant's motions for involuntary dismissal, directed verdict and judgment notwithstanding the verdict, as the evidence was clear that Appellee had not met the burden of proof by a preponderance of the evidence that the loss claimed from the accidental injury was not excluded by the exclusions of the policy as being due to illness, disease and bodily infirmity, the preponderance of the evidence clearly showing that Appellee's present disability is to a substantial portion due to the excluded items.

V ARGUMENT

SUMMARY OF ARGUMENT

Appellant's position is that any loss from disabilities of Appellee did not result directly and independently of all other causes, excluding any loss caused by or resulting from illness, disease or bodily infirmity, from bodily injuries caused by the accident of September 9, 1963; that the loss from disabilities of the Appellee was caused by or resulted from preexisting disease and bodily infirmities which are excluded from coverage by the policy; and that a substantial portion of the loss of Appellee from disabilities is due to an accident occurring outside of the coverage of the policy. Appellant further contends that Appellee has not met this burden of proof in establishing evidence sufficient to bring him within the policy as to the loss alleged, has not met his burden of proof in establishing that he was continuously totally disabled for one year after which he then filed his proof of loss; and that he has not met his burden of proof that he is permanently and totally disabled as not to be able to engage in any occupation or employment for which he is fitted by reason of education, training or experience for the remainder of his life. Appellant further contends the Court below committed substantial error in rulings on evidence, in the instructions given and refused, and in the prejudicial remarks and actions of the Court during the trial. For one or more of these reasons, the Court erred in refusing Appellant's motion for dismissal, motion for directed verdict, motion for judgment notwithstanding the verdict, and motion for new trial.

A. THE POLICY OF ACCIDENT INSURANCE

The policy of insurance of Appellant herein is an

accident policy providing specific indemnity for loss of life, limb or sight, or total disability. Any salaried employee after 90 days employment with the named companies was eligible to be insured under it, and the Appellee did apply and obtain coverage at the cost of $6.25 a month for the two months covered. The words of coverage and the exclusions from coverage must be carefully considered, for as it has been stated:

> "Insurance against death by accident is usually afforded for a small premium, and the coverage is correspondingly narrow. The liability is guarded by carefully chosen words. The courts have no more right to strain construction to make the policy more beneficial by extending the coverage contracted for than they would have to increase the amount of the insurance." *Davis v. Jefferson Standard Life Insurance Company*, 73 F.2d 330 (CCA 5th 1934) cert den. 294 U.S. 706, 79 L.Ed. 1241.

The policy clearly covers an incident caused by accident while the policy is in force for bodily injuries resulting directly and independently of all other causes from said accident. The policy specifically excludes, as distinct from excepts, any loss caused by or resulting from illness, disease, bodily infirmity, and other items. Its meaning can be determined by examining the facets of the policy, which are (a) an accident, (b) while the policy was in force, (c) the loss resulting directly and independently of other causes from the accident, (d) the loss is not caused by or result from the excluded items, (e) the definitions as to one year total continuous disability and the total permanent disability thereafter set forth in the policies have been met, and (f) proper proof of loss as a conditioned precedent has been made.

There is no issue as to the policy being in effect when an accident occurred to Appellee on September 9, 1963. Therefore, the first two points are covered.

The definition of accident becomes important because of the subsequent event of February 21, 1964, when on stepping out of the bed, Appellee claims a further and much more serious disability occurred. The same is outside the period of coverage of Appellant's policy and Appellee has sought recovery herein on the apparent theory that the subsequent event was not a separate, distinct accident, or a substantial intervening cause or excluded cause, but was merely a normal result of the earlier accident.

The courts of Idaho have defined an accident as an event where the results of an act were not natural or probable and could not be reasonably, under the circumstances, forseen, and are tragically out of proportion to the trivial cause. *O'Neil v. New York Life Insurance Company*, 65 Idaho 722, 152 P.2d 707 (1944). It is similarly stated that an accident ". . . is used in the . . . popular and ordinary sense is denoting an unlooked for mishap or untort exent not expected or designed." *Wilson v. New York Life Insurance Company*, 82 F. Supp. 292 (DC Idaho), Aff'd 178 F.2d 534 (CCA 9th, 1949). It is generally defined as:

> ". . . (A)n event which takes place without one's foresight and expectation, that is, a casualty—something out of the usual course of events—which happens suddenly and unexpectedly, without any design on the part of the person injured, and it is not the natural and probable consequence of an ordinary or common act, as distinguished from an event the occurrence of which involves no element of chance

or unexpectedness." 10 *Couch on Insurance*, 2d, Sec. 41:7, pp. 29-30 (1962).

Next subject for definition is the "resulting directly and independently of all other causes" from injuries caused by the accident and it relationship to the exclusion, that such loss may not be caused by or result from, among other things, illness, disease or bodily infirmity. If a policy contains only the first directly and independently clause, the general interpretation indicates that the accident has to be the efficient, substantial and proximate, but not necessarily the sole, cause of the disability at the time it occurs. The additional policy clause of exclusion for a "loss" caused by or resulting from a number of specified items limits the general applicability of the first clause, and in effect requires that a loss from an accident is not insured against even though the accident is the proximate cause if it acts in conjunction with such excluded items. The mere existence of disease, illness or bodily infirmity which does not act in a causal relationship with the loss from the accident would not limit the proximate cause definition. Likewise, such clause means that the excluded causes of loss can either be indirectly or partly responsible for the loss, because otherwise the accidental loss would not directly and independently of all other causes. The great weight of authority sustains these holdings.

The first exclusion of a loss "caused by" disease or infirmity means an accident contributing to or cooperating with the disease or infirmity to create the disability creates no loss under the policy. *Liberty National Life Insurance vs. Bailey*, 34 Ala. App. 199, 38 S.2d 295. The phrase of a loss "resulting from" a disease

or bodily infirmity means loss claimed under the policy may not arise by concurrent action between the accidental injury and a disease or bodily infirmity, such as where the accidential injury aggravates a preexisting disease or bodily infirmity and actually contributes to the ensuing disability. *Maryland Casualty Co. v. Morrow*, 213 Fed. 599, 52 LRANS 1213; *Herthel v. Time Insurance Company*, 221 Wis. 208, 265 N.W. 575 (1936); *First National Bank v. Equitable Life*, 225 Ala. 586, 144 So. 451.

The facts in the latter case are a good example of this, wherein the insured died as a result of a blow to the head caused by an accidental fall, death arising from meningitis superimposed upon the rupture of an existing brain abscess. Evidence disclosed the abscess in the brain was caused by an old injury with adhesions to the skull, and the blow to the temple of the insured in his fall ruptured the abscess with the infection following therefrom. Recovery was denied with the court giving a good analysis of the general law, among other things stating:

> "It seems, therefore, the great weight of authority supports the views expressed in our cases, vix. where there is special provision directing the attention of the insured to disease or bodily infirmity, and expressly including liability in case of death resulting directly or indirectly therefrom, some effect must be given to these provisions . . . The application of the principle of law to the case at bar is that, if the insured was suffering from a disease, which was accelerated and aggravated by the accident so as to be a cause cooperating with it to produce the fatal end, then there can be no recovery . . ." 144 So. at 454, 455.

The confusion that some courts have found, contrary to the weight of authority, in dealing with the exclusion provision in relation to the directly and independently of all other causes provision is noted in the case of *Russell v. Glenn Falls Indemnity Company*, 134 Neb. 631, 279 N.W. 287 (1938) where the court had before it a policy involving the "independently and exclusive of all other causes" clause together with an exclusion for disability caused by bodily infirmity or disease. In the case where disease added to the effect of an accident caused total disability, the Court stated:

"One source of confusion in the decisions on this question in the different courts, even in the same jurisdiction, is in applying the reasoning and law of one case, based on certain insurance contract providing for benefits resulting from accident, to another case with a different contract. Many of the cases are where contracts involve only the provision 'resulting directly, independently and exclusive' while others have the additional clause 'wholly or in part, directly or indirectly from disease or other bodily infirmity or other disease' or a phrase of a like nature. There is clearly a distinction between the two contracts . . .

"It seems reasonably clear that a policy with the phrase 'resulting directly, independently and exclusively' refers to the efficient, substantial and proximate cause of the disability at the time it occurred. On the other hand, a policy which also has the phrase 'wholly or partly, directly or indirectly, from disease or mental or bodily infirmity' refers to another contributory cause, whether proximate or remote." 279 N.W. at 291

An example of this is the case of *Beams v. John Hancock Mutual Life Insurance Company*, 325 F.2d 887 (CCA 6th) where some three months before the accidental fall of the insured he had had gall bladder troubles and the fall caused gall stones to obstruct the ducts, requiring surgery which caused complications and death. The court held death resulted from the combination of the fall and the gall bladder condition and allowed no recovery for accidental death in view of the additional exclusion of death caused by disease or bodily infirmity. Similarly in the case of *Welte v. Metropolitan Life Insurance*, 305 Ill. App. 120, 27 N.E. 2d. 63, where the death of the insured from bronchopneumonia followed an operation necessitated by a duodenal ulcer rupturing, where the rupture was caused by accidentally slipping and falling, recovery was denied because the death was not "directly and independently of all other causes from bodily injury" from an accident where the ulcer is not a normal part of a person's anatomy, but is a disease or bodily infirmity and contributed directly to the disability suffered.

The exclusionary clause applicable here, excluding loss caused by or resulting from illness, disease, bodily infirmity or bacterial infection other than from the accident, is similar to those construed in a number of cases. The Idaho law is set forth in *Rauert v. Loyal Protective Insurance Company*, 61 Idaho 677, 106 P.2d 1015. That policy excluded from a loss caused by accident anything due to a disease. Where the insured had had an earlier hernia operation which had resulted in a ring of adhesions, and a second hernia operation took place which resulted in strangulation of the hernia due to adhesions from the earlier op-

eration causing the death of the insured, the testimony showing that the fibrous condition was not "a disease," the verdict for the insured was allowed to stand. The forming of such adhesions and scar tissue were specifically held not to be a disease, based on the doctors' descriptions of it, one of whom called it an "unsound condition," and another referring to the adhesions as resulting from prior operation as infirmities. 106 P.2d 1015. This allowed the Idaho Court to find for the insured, but the need to make the strained construction of the policy exclusion is a holding that if the word "infirmity" had been present, no recovery would have been allowed.

Many of the cases, however, make little distinction between disease, and infirmity, such as Chief Justice Cardozo in *Silverstein v. Metropolitan Life*, 254 N.Y. 81, 171 N.E. 914 at 915, where he defines both as:

> ". . . a morbid or abnormal condition of such quality or degree that in its natural and probable development it would be expected to be a source of mischief, in which event it may fairly be described as an illness or infirmity."

Cases specifically hold that bodily infirmity comprehends abnormal weaknesses of the body. Thus *New York Life Insurance Co. v. Bruner*, 129 Ind. App. 271, 153 N.E. 2d 616 (1958) holds where the insured voluntarily consented to the administration of a spinal anesthetic, which was properly administered, and the insured died as a result of supersusceptibility, no recovery was allowed as the death was not directly and independently of all other causes from accident as opposed to infirmity or illness. That case cites *Davis v.*

Jefferson Standard Life Insurance supra, which holds that bodily infirmity includes such abnormal weaknesses as well as acute diseases. The exception, nevertheless, does not require the insured to be in perfect health, and the exclusion does not include mere frail general condition or a mere tendency to a disease. 10 *Couch on Insurance*, 2d, Sec. 41:384, p. 351 (1962), and cases cited.

It is immaterial under the type of policy here whether the disease or bodily infirmity incurred prior to or after the issuance of the policy as long as neither was directly caused by the accident. *Lado v. First National Life Insurance Co.*, 182 La. 726, 162 So. 579; *Moore v. Southern Life & Health Co.* (La. Ct. of App.), 195 So. 857. In effect there can be no recovery for the insured's loss, whether a disability or a death, under this type of policy results from an accidental injury acting in conjunction with a preexisting bodily infirmity. *Rhoda v. Metropolitan Life Insurance Company*, 354 Pa. 313, 47 A.2d 152. Where a preexisting infirmity exists which cooperates with or contributes to the accidental injury, no liability can exist under such policy for accidental injury solely, independently and exclusively from the cause, with the exclusion as noted in this case. *Liberty National Life Insurance Co. v. Bailey*, supra.

It is clear from the policy before the court that the exclusion clause demands more than the accident be the "approximate cause" in that the loss cannot be from an accident in conjunction with or aggravated by the excluded items. The balance of the definitions in the policy, concerning permanent and total disability and concerning proof of loss will be discussed in the arguments on these points.

B. BURDEN OF PROOF UNDER POLICY

The specific wording of the accident policy determines the burden of proof here. The burden is on the Appellee as plaintiff to show that the bodily injuries for which a loss is claimed were caused by accident resulting directly and independently of all other causes and even so not including the excluded cause in any degree. It is undisputed that this requires him to show approximate cause in the sense used in insurance policies.

The dispute arises concerning the burden of proof in relation to the excluded items. The Idaho court has recently definitely determined this question. In *Evans v. Continental Life & Accident Co.*, 88 Idaho 254, 398 P.2d 646 (1965) under a group insurance policy containing accidental death provisions, and containing exclusions relating to coverage by Workmen's Compensation law and from disease of the body or mental infirmity, as well as the clause of "independently of all other causes," the court placed the burden on the plaintiff. It specifically held that the burden was on the plaintiff to avoid the excluded items in order to recover on the accidental portion of the policy. The case quotes with approval from *New York Life Insurance Co., v. McNeely*, 52 Ariz. 181, 79 P.2d 948 (1938) as follows:

> "It will be seen by referring to the double indemnity provision above set forth, that it is payable only on proof that the death of the insured resulted directly and independently of all other causes from bodily injury affected solely by external violent and accidental means. Under provision of this kind, it is necessary not only that the beneficiary of the policy prove the death of the insured, but also prove affirm-

atively, by a preponderance of the evidence, that such insured came to his death by reason of the specific cause as set forth in the policy, and from those causes only . . ." 79 P.2d at 948

The reasoning of the *McNeely* case thus adopted by the Idaho court is set forth more clearly at page 952 of 79 P.2d, where the court emphasizes the distinction between accident policies with exclusions, and other types of policies such as life insurance with exceptions. It quotes with approval as follows:

> "The differences that have arisen as to which party bears the burden of persuasion in insurance cases, when the defense is based on suicide, have been caused in part by a failure to distinguish between cases in which the plaintiff sues on an accident insurance policy or the double indemnity clause of the life insurance policy, and cases in which the insurer in a life policy raises the defense of suicide. If death from any cause except suicide is insured against, the burden is on a company to prove the exception; but if death from one specific cause, such as accident, is insured against, the burden is on the policyholder to show the condition precedent to liability has taken place . . ."

The only difference between the policy of the *Evans* case and the present policy is that the particular exclusion which was involved was whether the accident was covered by Workmen's Compensation. The court held that the plaintiff beneficiary had the burden of proving that the exclusion of workmen's compensation coverage did not apply to the accident and held for the defendant on failure of proof. An exclusion for disease or infirmity was also listed in the same area of the

policy in the Evans Case. Therefore, the same logic is applicable to our case as to the exclusion there.

That the burden to avoid the exclusion is on Appellee is made very clear by the Idaho Court quoting from *Metropolitan Life Insurance Company v. Rosier,* 189 Okla. 448, 117 P.2d 793 (1941), where a nearly identical policy is involved. There the coverage was for a loss directly and independently of all other causes as well as the specific exclusion if "caused by or contributed to . . . by disease, or by bodily or mental infirmity." 117 P.2d at 794.

The Evans Case also quotes the case of *Washington National Insurance Co. v. Chavez* (Tex. Civ. App. 1937), 106 S.W.2d 751, approving the holding that:

> ". . . a plaintiff suing on an accident insurance policy has the burden of pleading and proving that insured's death was accidental and not within exceptions..."

A typical case is *Lucas v. Metropolitan Life Insurance Co.*, 339 Pa. 277, 14 A.2d 85, 131 A.L.R. 235 (1940), where the court states:

> "Where the liability of the insurance carrier is so restricted, [by the exclusionary clause plus the general clause] it is not sufficient for the insured to establish a direct causal relation between the accident and the loss or disability. He must show that the resulting condition was caused solely by external and accidental means, and if the proof points to a preexisting infirmity or abnormality which may have been a contributing factor, the burden is upon him to produce further evidence to exclude that possibility." (item added)

Clearly the Idaho court under its recent case has in effect said that where a loss from accident is insured against, the burden of proof is on the plaintiff to show that it was totally accidental as to the excluded items. As we will argue below, Appellee has not done this.

The other definition items, on total disability and as to the proof of loss, will be discussed in the legal argument on them below.

C. IS APPELLEE'S CLAIM WITHIN THE POLICY

This section of the argument discusses the sufficiency of the evidence under the applicable law in relation to the court's denial of Appellant's motion for a dismissal at the end of Appellee's case, for a directed verdict, for a judgment notwithstanding the verdict, and for a new trial in relation to the merits of the action apart from the alleged errors of the court on evidence and instructions set forth below.

Appellee has failed in his case in three particulars. He has not established by a preponderance of the evidence that the disabilities suffered by Appellee today resulted directly and independently of all other causes from the accident of September 9, 1963, and in fact the evidence is clearly to the contrary. Many infirmities existed prior to the accident in September of 1963.

Dr. Kiefer's operation in February, 1964, proved two infirmities existed, one being a hard boney ridge of protruding herniated disc, as opposed to a fresh juicy one, and the other was osteophytes at both the C-6th and 7th level operated. The testimony is uncon-

tradicted that neither the hard, boney, herniated disc nor the existing osteophytes could have been created by the accident some four months prior, and that it would have taken anywhere from three to ten years for them to develop. The evidence is uncontradicted that the pain in the neck and head as well as the radiation of it into the shoulders and left arm came from the impingement on the nerve caused by a vice effect between the vertebrae as enlarged by the osteophytes and the protruding hardened disc, which the accident of Sepember 9, 1963 aggravated. The evidence is uncontradicted that but for the existing osteophytes and hard protruding disc the symptoms from the injury of September 9, 1963, would have ceased in a few months. Both the operating physician, Dr. Kiefer, and Appellee's witness, Dr. Shaw, believe that substantial relief had been obtained from the symptoms in the cervical spine by the operation of February, 1964. While Appellee's witness Dr. Burton did not so agree, Dr. Shaw and Dr. Kiefer both were of the opinion that as far as the cervical spine was concerned, Appellee could return to work.

The material point is that the osteophytes, the hardened protruding disc C-7th level, the indicated protruding but symptomless herniated disc at the C-6th level, and the well recognized increased arthritis from previous injuries all existed prior to the September accident, and are clearly "bodily infirmities" within the policy definition. They related directly to the neck problem. They are bodily ailments of an established character not usually found in an average person which were aggravated by the accident and worked in conjunction with it.

Appellee at the time of the September accident also

suffered from disabilities in the lower back primarily resulting from the severe accident of November 1947, by an injury of October, 1952, by injury of November, 1955, an injury of October, 1961, and the injury of June, 1962. It was uncontradicted that such prior fusion operation and the disability relating to it could at any time thereafter cause him considerable trouble, lead to greater strain and wear on the joints above the fusion, and was clearly a chronic condition. If the leg disability is related to the September accident, this prior infirmity directly related, also, and again, this is a bodily infirmity within the exclusion of the policy.

Appellee had other disabilities. His loss of hearing was extensive. His vital capacity had been reduced by the accident of May 24, 1963, together with heavy smoking and incidences of chronic bronchitis and emphysema, by approximately 40%. Dr. Burton stated this could cause the pain from lack of circulation in the lower extremities (TR 159-160). Dr. Burton also rated the burns which Appellee suffered in the May fire as on the right hand 50% of loss of the hand at the wrist and on the left hand at 15% of the loss of the hand at the wrist (TR. 136-7). The Appellee himself testified he had been somewhat short of wind ever since the fire of May, 1963.

Appellee's evidence could not distinguish the disability from the September 9 accident from the previously existing bodily infirmities, and in fact the evidence is clear cut that there was a complete interaction between the pre-existing disabilities and the accident to create the symptoms that continued prior to surgery, and such residual as existed after surgery. These pre-existing disabilities acted in a major way, not

in an extremely remote and unconnected manner, with the blow received in the fall in September, to create such residual as now exists. In any event, the fact that there is some residual pain in the neck and shoulders, an a minor lack of feeling in a few fingers and the lower side of the forearm, is not sufficient to totally disable any man. There is no muscle malfunction or atrophy. The result is that the pre-existing condition materially intervened in and acted with the accident and, therefore, the policy does not cover the disability that resulted.

As to the event of February 21, 1964, careful analysis of the facts shows that placing the myelogram fluid in the back and removing it did not cause any sudden pain, or any disabilities in the Appellee. The usual temporary headache and perhaps ache in the lower back and legs, of a mild nature were noticed only. It is not this event, but the event when after the myelogram and when he had been directed to lie flat in bed, some few hours later Appellee stepped out of bed and upon standing up immediately felt severe pain from the hips to his feet. It is this severe pain which he claims has continued up to the present time, that is the major disability for which he seeks recovery.

The evidence is uncontradicted as to the following conclusions in relation to this February 21, 1964, event of stepping out of bed. The first is that no doctor had ever found or known of such a severe reaction to a myelogram occurring within a few hours of the myelogram. The second is that a reaction, if any, to the myelogram which would occur normally within 24 to 48 hours after it is practically always associated with a marked increase in temperature and commensured increase in

pulse rate and respiration rate, which is the normal result of a major inflamation of tissues of the body; but that in this case none of these indications were present. This conclusion is reinforced by the fact that the record kept by the hospital of the hour to hour treatment and care of the Appellee also indicates only mild medication and no unusual pains. The third uncontradicted conclusion is that for a myelogram to create irritation that could create a disability in the lower extremities would take time for the irritation to create scar tissue and for the scar tissue through adhesions or pressure to affect the nerves of the lower extremities. The pains having continued about as they commenced, and there being no neurological changes or muscle atrophy in the lower extremities of Appellee showing nerve damage, it is clear that irritation from the myelogram has not been proved.

Appellee has not proven that the disability in the lower extremities independently of all other causes came from the September 9 accident. There are two bases why this proof fails.

1. *Second Accident Caused Lower Extremity Pain.*

The most likely explanation of what happened is that a second accident happened to Appellee after the accident policy had expired. The event stepping out of bed on February 21 meets the definition of an accident, as the results of the event were unexpected, untoward and highly out of proportion of anything that occurred. It was uncontradicted that if the myelogram did cause it, the result was extremely unusual and severe.

The Idaho court has passed on similar situations and held a similar second event to be a separate and distinct

accident. In *Wilson v. New York Life Insurance Company*, 82 F.Supp. 292 (DC Idaho) Aff'd 178 Fed. 2d 534 (CCA 9th 1949) the insured had a hernia operation and when snoring under sedation thereafter violently coughed which broke loose a thrombus which caused death by a pulmonary embolism. While recovery was allowed because the infirmity was the accident, the court specifically says that recovery could not be had under such exclusion provisions where the bodily infirmity as here clearly existed prior to the accident or was contracted subsequent to and independent of the accident. 178 Fed.2d at 536.

The case holds that when in the medical treatment unusual, unexpected, and violent result compared to the cause occurs it is an accident, entirely separate from the pre-existing infirmity, the hernia, in the above case. The same logic is applicable here, the only distinction being the insurance policy was in effect at the time of the medical accident in the *Wilson* case but not at the time in our case. The Idaho court concluded that the unusual result of medical treatment was an accident and the proximate cause of the disability, and the same law applies here regardless of when the insurance policy was in effect. An example of this type of situation is *Aetna Life Insurance v. Brand*, 265 Fed. 6, cert. denied 40 S.Ct. 587, 253 U.S. 496, 64 L.Ed 1031, wherein the insured was operated upon for a hernia and during the operation, the surgeon punctured an artery located in an unusual place, gangrene setting in and the leg being amputated. The court stated

"Considering this record, there is no evidence from which any jury could have found as a fact that

> Brand's hernia caused the pricking of his artery. Such a verdict would have been as far fetched as to find that, had the ceiling fallen while he was strapped to the operating table, the hernia that brought him to the table caused or contributed to the injury produced by the falling plaster." (265 Fed. at page 7.)

The court's holding of an accident within the policy despite the existence of preexisting condition based on the lack of casual relationship is equally applicable here. By the same logic it establishes that recovery could not be had from an unrelated earlier accident.

The Idaho court has followed the breaking of causation as to the second accident in a number of cases. In *Linder v. City of Payette*, 64 Idaho 656, 135 P.2d 440 (1943), a person who had suffered a former accident and had an eight-pound cast on his arm, fell out of a boat and drowned. This was held not to be in the normal consequence of the original broken arm and the chain of causation had been broken by a second accident which was intervening, independent and culminating cause, precluding the earlier accident from being the proximate cause. The same is true of the second accident in *Kiger v. The Idaho Corporation*, 85 Idaho 424, 380 P.2d 208 (1963).

While Appellant finds no case directly involving a myelogram, an analogy can be noted from a case where the administration of novocain in a tonsilectomy caused paralysis to the respiratory center and death. The unusual nature of the result was held to be accidental. *Mutual Life Insurance Co. v. Dodge* (CCA 4 1926), 11 F.2d 486, cert. den. 271 U.S. 677, 70 L.Ed.

1147. It is stated at 10 *Couch on Insurance*, Section 41:114, page 145 (1962) that

> "If for no foreseeable reason the insured dies from the administration of anesthetic, it is generally held that such death is an accident, is accidental or is caused by accidental means." (Cases cited).

While not strictly applicable, in that the broad test of foreseeability does not apply to contract cases, the negligence area cases indicate a similar result. A tortfeasor is liable only for the ordinary forms of professional negligence in treatment of the victim, but is not liable for unusual misconduct which is intentional injury, or extraordinary happenings. *Prosser on Torts*, Sec. 49 (2d ed. 1955), p. 272, 273; 2 *Restatement of Torts* 2d, Section 457, Comment d, p. 498 (1965). Leaving aside the question of foreseeability, there is no distinction in the application of the analogy of intervening cause or breaking of the chain of causation. In *Federal Life Insurance Company v. Raley*, 130 Texas 408, 109 S.W.2d 972 at 974, it has been held that where a plaintiff accidentally ruptured his right groin working for a railroad and the doctor operated on the left groin by mistake, the railroad was not liable as

> "such mistake was not an act of negilgence which could be found to flow legitimately as a natural and probable consequence of the original injury, and a ruling in effect to the contrary could not properly have been made."

> ". . . the act of the defendant in operating on the wrong side was a wholly wrongfully, independent and intervening cause for which the original wrong-

doer was in no way responsible." *Purchase v. Seelye*, 231 Mass. 434, 121 N.E. 413, 8 A.L.R. 503 (1918).

The analogy is equally applicable here where the result of stepping out of bed in no way has been related to the accident of September 9. He could just have well slipped on a banana peel and fallen at that point, as far as creating liability under the insurance policy.

Basically, the courts have realized that some limit must be placed on the insurer's liability, which otherwise could be stretched to infinity from one consequence succeeding after another in a chain of events beginning with an insured's accident. They have adopted, therefore, in the insurance cases the proximate cause portion of negligence law that the insurer is not liable for everything that happened that might not have happened but for the insured accident. If a person who caused the first automobile accident is held not liable for the aggravation to the neck and head injuries of the plaintiff in the first accident as a result of the second accident by a third person, *Armstrong v. Bergeron*, 104 N.H. 85, 178 A.2d 293 (1962), the fact of Appellee's original accident here shows the but for its existence the second matter would not have arose argument creates no liability.

The unusual and extraordinary and violent nature of the subsequent event is not includable within the original accident liability within the policy because proximate cause does not include "casualties which, though possible, were wholly improbable." *Corbett v. Clarke*, 187 Va. 222, 46 S.E.2d 327, at 328 (1948). In the present case, it becomes apparent that whatever the cause was, even if related to the myelogram, it was both highly unusual and unexpected.

2. *The Event Of February 21, 1964, Was Caused By Pre-existing Bodily Infirmities.*

Even if it can be argued the event which occurred when Appellee stepped out of bed was not a separate and distinct accident, the evidence clearly shows it was related to a bodily infirmity existing prior to the accident. The evidence is quite clear that it came from one or two other causes, both bodily infirmities. As noted, the 1947 accident to the Appellee's back was a major event. Appellee's witness, Dr. Shaw, and Appellant's witness, Dr. Raaf, both noted that one of the probable causes of the pain related to the earlier fusion operation.

If the physicians believed that it was due to some irritation of the nerve roots probably by scar formation, it is clear the scar formation referred to was from the earlier injury as it would not have had time to form within a few hours of the myelogram. (TR 195) The same conclusion as to the pre-existing infirmities is reached because Dr. Shaw testified that the number of prior accidents were a material part of his present disability. Dr. Raaf similarly testified, after stating without the pre-existing infirmities the neck symptoms would have subsided rather quickly, that the pre-existing osteoarthritis accounted for a part of his present disability. The same conclusion is reached by the statement of Dr. Burton and Dr. Shaw that each succeeding accident added its toll and that the last accident was the straw that broke the camel's back. Under the case law previously cited, this totaling of prior disabilities and the last accident is an excluded loss, even if a proximate relationship can be traced between the accident of September 9 and the need for the myelogram.

3. *Disability Not Due To Medical Treatment Within Accident Policy.*

While implicit in the earlier argument, a restatement of the proximate cause analogies is applicable to the question of medical treatment creating the loss after an accidental injury. Here there are two reasons which prevents any liability attaching from the original accident due to subsequent medical treatment, the first being that any loss resulting from stepping out of bed after the myelogram was so highly unusual and unexpected as to be an intervening cause, and the second is that the result of stepping out of bed can only be attributable to pre-existing bodily infirmities, and excluded cause. In effect, neither create a loss which results directly and independently from all other causes from the accident.

There is no evidence that establishes that several hours following a myelogram getting out of the bed is going to cause what happened here as a normal result of medical treatment, particularly when the event is so small and the result is so sudden and violent in relation to it. The same requirement of policy of directly and independently of all other causes, and the same exclusion clause, not from bodily infirmity, are applied to the medical treatment question. Thus, under an accidental liability policy which excluded items absorbed, inhaled or taken causing the loss, where death resulted from the cooperation of an unknown cause with chloroform administered by a doctor in relation to treatment of an accident injury, recovery was not allowed. *Westmoreland v. Preferred Accident Insurance*, 75 Fed. 244 (Cir. Ct., N.D. of Ga.).

While the rule in case of negligence is that the tort-

feasor takes the injured person in whatever condition he may have been found, this does not apply to accidental insurance cases. Only the proximate cause relationship is applicable from Tort law, and the cases cited above followed the theory that the mere fact an automobile accident happened, and a meteorite happened to strike the person after his car was wrecked, does not mean the injury from the meteorite could be recovered for in an insurance case. This can be stated also that the second incident, stepping out of bed, by itself is a sufficient sole and proximate cause of a disability and if that is true to relate back the first accident of September 9, 1963 could not also be one. That the unusual second event occurred while Appellee was in the hospital but not directly caused by or related to the September accident, does not change this reasoning.

In summary, the facts in this case show the actual disability from which Appellee claims to be totally disabled is that of the lower extremeties, not the cervical spine, and he has failed to prove that this lower extremities disability was not a separate accident, was not based on pre-existing bodily infirmities, was not the normal and usual result of medical treatment, and to the contrary the evidence shows that whatever occurred must have acted in conjunction with the existing disabilities. The Idaho court has held in *New York Life Insurance Co. v. Wilson*, *supra*, that in combining the directly and independently of all other causes clause with the exclusionary clauses for illness or bodily infirmity, that the exclusionary clauses nevertheless would allow recovery where there is

> "... bodily infirmity or disease directly attributed to and approximately caused by the accident. Such

provisions apply only to bodily infirmity or disease existing prior to the accident or contracted subsequent to and independently of the accident." 178 F.2d 536.

The case thus held the thrombus was a bodily infirmity which would normally avoid recovery under the accidental policy, except for the fact that it was the accident in itself. In the present case, if the pain and cramps in the lower leg on the stepping out of bed were the accidents in themselves, they did not occur in the policy. Secondly, it is uncontradicted that the event of stepping out of bed was in conjunction with or aggravated pre-existing infirmities.

For example, an accident fractured the insured's leg at a point where a cyst had developed as a result of a disease, and the disease interfered with the healing of the leg after the injury, whereby recovery under the accident policy was denied based on the combination of an accident and pre-existing condition. *Davis v. North American Accident Insurance Company,* 42 Wash. 2d. 291, 254 P.2d 722. See also *Romanoff v. Commercial T. M. Accident Association,* 243 App. Div. 725, 277 NYS 291. By comparison after an accidental fall, an operation on a previous existing hernia was required. Due to the operation and the subsequent weakness, the insured contacted pneumonia and died. The physicians testified pneumonia germs were present in well persons and that a weakened person was more susceptible. The court allowed recovery, saying

"We hold, therefore, that when death results from disease *which follows as a natural* though not necessary *consequence of an accidental injury,* it is within the terms of the accident certificate, death being

deemed the proximate result, not of the disease as independent cause, but of the injury." *Kane v. Order of United Commercial Travelers of America*, 3 Wash. 2d. 355, 100 P.2d 1036 (1940) at 1040. (Emphasis added.)

These analogies show the crucial distinction, as to whether the chain of causation is continued in the first place, and second, even if it has, whether bodily infirmities which occur in conjunction with the accident are within the exclusions of the policy. If either the chain of causation is broken or an excluded cause cooperates with the original cause, no recovery is allowed. The Appellee in this case is no more entitled to recovery than the insured who accidentally stubbed his toe on some furniture and delayed going to the doctor for a few days, at which time it was discovered his middle toe was broken. Subsequently, he entered the hospital for a desired amputation of said toe and in a routine examination was found to have diabetes, which lead to a postponement of the operation for some four weeks as it would be hazardous. Later on entering the hospital for the amputation, it was discovered that the toe had gangrene and required amputation of the leg at the knee, from which the insured died. The autopsy revealed the insured suffered arterio-sclerosis, an affliction of the heart, enlarged kidneys, and a disease pancreas. Instruction to the jury that recovery could be had regardless of concurring causes, one being the injury and the other being the diabetes, was held error. *Maryland Casualty Company v. Morrow*, 213 Fed. 599 (CCA 3rd 1914).

D. APPELLEE HAS NOT SHOWN TOTAL DISABILITY OR PROPER PROOF OF LOSS

Assuming for purposes of argument, without con-

ceding the same, that the disability of the Appellee arose within the coverage of the policy, he has failed to prove total disability within the proof of loss provisions. After the accident of September 9, 1963, total disability could only exist "after one year of continuous total disability." The facts show that he had his accident a little before noon on September 9 and continued on the job until sometime after lunch, going to the first aid station. His first day off work was September 10. "After one years of continuous total disability" would not occur until at least September 10, 1964. There was no evidence of the receipt of Exhibit 2, consisting of the proof of loss form and the attending physician statement, except its date September 8. The pretrial order, R48-9, was amended on motion of Appellant, R51-54, which is allowed as to paragraph 3 thereof at TR3-4, provides that Exhibit 2 was received by Appellant on or about September 9, 1964. On this record, the court by Instruction No. 11, (TR 434) said

> "You are further instructed that legal notice and proof of loss were timely made."

Error was thus committed by withdrawing a factual issue from the jury, particularly where only an inference could be drawn from the pretrial stipulation as to receipt, but no evidence existed as to whether or not notice was made after one year continuous total disability.

That the sufficiency and receipt of notice and proof of loss are for the jury is undisputed if any issues of fact exist. The issue here is not whether proof of loss was received by the company, but whether the condition precedent after which it could be filed had occurred.

"The giving of notice provided for in an insurance policy is generally spoken of as a conditioned precedent to the insurance duty to pay . . . the burden of proof is upon the plaintiff to plead and prove compliance or excuse for noncompliance with such condition." *Kennedy v. Underwriters at Lloyds, London*, 32 Cal. Rptr. 685 at 687, 219 Cal. App. 2d 11 (1963).

Because the pleading of the Appellant denies the allegations of plaintiff's complaint alleging due notice, R34, the mere stipulation that proof of loss was received at an approximate time is not a stipulation of fact that it was received after the required waiting period in the policy. Only if all these matters has been affirmatively stipulated would there be no burden of proof for Appellee to meet and would the instruction have been proper. *Reserve Life Insurance v. Luedke*, 132 Ind. App. 476, 177 N.E. 2d 482 (1961).

The substantial compliance rule does not aid Appellee in this matter. It is not a question of the company receiving the notice, to enable it to make due investigation, but a question of whether a conditioned precedent for an expiration of time as required in the policy had been met. There is insufficient proof upon which the court could decide as a matter of law in Instruction No. 11 that the policy terms had been complied with. Even if it can be argued that inference may have arisen from the pretrial order, this still leaves a question of conflicting inferences. Was it before the 9th of September or sometime a number of days after the 9th of September? In such event it is nevertheless, a question for the jury on conflicting inferences. *Long v. Equitable Life Assurance Society of the United States*, 70 Ohio App. 277, 60 N.E.2d 805 (1945).

The Idaho court in *Bennett v. New York Life Insurance Company*, 63 Idaho 427, 121 P.2d 551 at 555 quoted from *Conlon v. Northern Life Insurance Company*, 108 Mont. 473, 92 P.2d 284, approving the general principle that, proof of loss being the conditioned precedent as well as notice of loss being a conditioned precedent, the burden is on the Appellee plaintiff to show compliance with all of these requirements, and in failing to do so, the court must direct a verdict for the insurer. Specifically, the uniform provisions of the policy, R 44, require that notice of claim be given within twenty days after the occurrence or commencement of any loss or as soon thereafter as reasonably possible. In a separate paragraph written proof of loss must be furnished within 90 days after the date of a loss. Thus it is noted that Appellee should have given notice of possible claim after his injury, but before the total continuous disability for one year had existed, to allow the insurer to investigate the matter. There is absolutely no proof that any notice of claim was given. Under the above-cited *Bennett* case, the Idaho court has followed the principle that both notice of claim and proof of loss must be shown as a conditioned precedent.

The key point is that the Appellee could not have known until after the full year of continuous total disability whether or not he would be permanently and totally disabled. In fact, as Appellee relies on the pain and lack of sensitivity in his left arm as part of his disability, and the record clearly shows that these did not arise until sometime after the original accident. The loss involved is not the accident, or the beginning of it, but in total disability cases is the completion of a period of time, which would be late in September.

As to the proof of total disability, assuming proper

proof of loss had been made. Even assuming for the purpose of argument an accumulation of the disability from accidents and disabilities arising therefrom, it is clear Appellee has failed to prove by a preponderance of the evidence total disability. Nevertheless, such existing disability cannot include loss resulting from or caused by illness and bodily infirmity. The plaintiff's proof would have to separate out and distinguish that portion of all of his disability which could only arise from the accident of September 9, 1963, and prove that this totally disabled the Appellee. He therefore has not proven total disability within the policy terms.

The evidence is uncontradicted that the Appellee can engage in some work. His testimony shows that he is a literate person, that he can read and write, that he has had extensive travel and work in foreign lands with the experience commensurate therewith, and that he is familiar with the organization of construction jobs and the equipment used thereon. The fact that the Appellee has deliberately not applied for any other job of any type since May of 1964, clearly shows the failure of Appellee's proof that he could not work. The mere fact he couldn't sweep the floor three months after his cervical spine operation is not proof that at the time of the suit he could not engage in some work.

Appellee has another problem. The surgery in February 28, 1964, materially corrected the disability from the September accident. It is only because of February event that he has any difficulty in his lower legs which is his main complaint and reason for being unable to work. It cannot possibly be claimed that the latter ground has existed for a continuous year prior to proof of loss. The term "permanent disability" is defined as:

> "The common interpretation of the expression 'permanent' is . . . a disability which will persist for a long or indefinite period of time, as distinguished from a condition which is merely transient or temporary." 1A Appleman, *Insurance Law and Practice*, p. 529; *Crowe v. Equitable Life Assurance Society of the United States*, 179 La. 444 154 So. 52, (1934).

A new disability arose in February, yet the proof of loss claims only disabilities from the September 9 accident. The total year has not expired, as to this new matter.

That a proof of loss may come too early and avoid the action has been so held. In *Hovhanesian v. New York Life Insurance Co.*, 310 Mass. 626, 39 N.E.2d 423, 138 A.L.R. 1369 (1942), the proof of disability was ruled insufficient, one of the main grounds being that it was received 12 days early prior to the completion of a 60-day period of disability. See also *Columbian National Life Insurance Company v. Buntin*, 43 Ga. App. 698, 159 S.E. 891 (1931). *Corbett v. Phoenix Mutual Life Insurance Co.*, 259 N.Y.S. 221, 144 Misc. 872 (1932).

It therefore appears that Appellee has failed to meet his burden of proof in relation to the proof of loss provisions of the policy and the total disability provision therein.

E. THE COURT BELOW COMMITTED SUBSTANTIAL, PREJUDICIAL ERRORS AT TRIAL

Listed hereafter are matters which Appellant believes are substantial, prejudicial errors committed during the trial of this action.

1. Admission And Rejection of Evidence

The court committed substantial error in admitting Exhibit 20, marked TR 243, admitted 246. The exhibit is a report of medical examination made of the Appellee by a Dr. H. V. Firor, dated September 17, 1962. The exhibit was offered as a part of a direct examination of Alfred J. Goade, manager of accounting and administration for Morrison-Knudsen Company (TR 239). It was objected that it was hearsay, (TR 244, line 25) and upon further questions in aid of the objection further objected to as not binding upon the insurance company, as immaterial and irrelevant, incomplete and without proper foundation as a business record maintained under the supervision of the witness. (TR 245) The physical examination had nothing to do with the issuance of the insurance policy, was a record maintained by the personnel office and not under the control and maintenance of the witness in accounting. (TR 244) The witness did not know if there were any other laboratory reports, x-rays or other sheets with the report because "I asked for this and this is what I received." (TR 246) It was error to admit this exhibit, as the court practically conceded in its remarks before the jury, stating: "My only question now is whether you want to take time to get the office manager to identify them." (TR 246) The admission was particularly damaging because it did not list the previous disabilities, and because on the face of it it states: "Physically qualified for arduous work overseas."

The business records exception to the hearsay rule does not permit the admission of this evidence. § 9-413 to 9-416, Idaho Code and § 28 U.S.C.A. 1732 have both been interpreted under the general rule to only allow

admission of records made in the regular course of business, if they are properly identified and if they are offered by the custodian or other qualified witness who prepared them or supervised their preparation. The same rule applies to medical records, as it is stated:

> "Medical records, in order to be admissible in evidence, must be properly identified and authenticated by the custodian or other qualified witness, and there must be proof of compliance with requirements of the statute relating to the admissibility of business records." 32 C.J.S. §730(2), at p. 1054.

> "A writing is not admissible under a business record statute merely because it may appear on its face to be a writing made by a physician in the regular course of his practice, but it must first be shown that the writing was actually made by or under the direction of the physician at or near the time of his examination of the patient in question and also that it was his custom in the regular course of his professional practice to make such a record." Supra at p. 1053.

It has been held that where papers were not the product of a regular clerical system, had not been checked and supervised in their preparation by a supervisor of any nature in relation to the person seeking to authenticate the document, and involved independent discretion and judgment of a person preparing them, that they are not admissible. *Hartzog v. United States*, 217 F.2d 706 at 710. Berlin, a special agent of the Internal Revenue Service, testified as the alleged supervisor of the making of certain work sheets by a deputy collector named Baynard. The work sheets of said Baynard, who had died, were somewhat haphaz-

ard in their preparation, and as to their admissibility under identification by the special agent Berlin, the court stated:

> "On the record presented to us, it does not appear that the work sheets prepared by Baynard were prepared under such circumstances as will provide a guarantee of trustworthiness. . . . They were Baynard's personal working papers, were the product of his judgment and discretion and not a product of any efficient clerical system. . . .
>
> "The second circuit quite properly held that testimony of a supervisory agent alone is sufficient when he has had complete supervision and direction of the preparation of the evidence which he offers. We do not think such supervision and control existed in the instant case. Baynard was not a mere tool of Berlin. He exercised his own discretion and judgment as to the classification of the information which he alone saw. While Berlin may have been his 'supervisor,' in fact the two parties were operating on the same level of this investigation. Moreover the Mortimer case is founded on the assumption that the evidence was compiled 'according to a method at once practical and offering reasonable guaranty of accuracy . . .' 18 F.2d at p. 269. We do not think that Baynard's work sheets were prepared by such a method." 217 F.2d at 710.

In the present case, the witness as the manager of the accounting department was not the supervisor over the personnel department from which the record was obtained, and he merely got it by asking for it. There is no evidence of supervision of the doctor, or how his report was required or made. There is an absolute

failure of proof as to the source of the record in the personnel department, or whether the procedure under which the company obtained it was the result of "any efficient clerical system." It is clear that even if it was identified that there was no foundation for the other requirements of the business record exception to the hearsay rule. Proper objection was made.

A second substantial prejudical error was committed by the court below in refusing to allow Appellant to read to the jury and ask questions concerning prior inconsistent statements of Appellee. The verified complaint was marked as Exhibit 12, and the appellee asked to read

> "On or about September 9, 1963, the plaintiff suffered an accidental injury to his spine causing immediate total disability." R11

This was not read to the jury and when the Appellee was asked if he still claimed that his disability arose immediately following the accident of September 9, 1963, the court sustained an objection which contained no reason for it (TR 86, line 3) and refused to admit the exhibit when it was offered even though no objection was made by Appellee to the offer. (TR 86, lines 15-25) This has been held to be error:

> "Admissions, if material, are always admissible. Sometimes they have a controlling weight with a trier of facts. There can be no more solemn admissions than those made by a pleading, the very purpose of which is so to state the pleader's claims that they may be submitted to a judicial tribunal for final determination. For that purpose, they are drafted, submitted, and become part of the record.

Although a part of the record, his own pleadings cannot be used by a party over objection because they are his own statements, prepared for the very purpose of putting his case in the best possible light. Hence, they are ordinarily selfserving and so should not go before the jury at all. But when a party incorporates in a pleading an admission, an opposite condition is created and the confession may be used by his adversary at any time during the trial and for any legitimate purpose, without introduction in evidence . . . The only thing to be determined by the judge as a preliminary is whether the pleading is an admission or reasonably to be construed as such. If that be the case, it may be read to the jury at any proper time on behalf of the adversary." *Hork v. Minneapolis Street Railway Co.*, 193 Minn. 366, 258 N.W. 576 (1935) at 577.

Further, courts allow pleadings to go into evidence to show admissions against the party who has pleaded them. Thus it is stated:

"That allegation may be regarded either as a formal admission for the purpose of this action, and as such binding and conclusive throughout the case upon those in whose behalf it was made; or as an evidentiary declaration. And, even considered in the latter and less absolute fashion, it is highly significant. It is to be understood as the reflection by plaintiffs' counsel of the factual setting of the misadventure in suit, which had been disclosed to their counsel by or in behalf of the plaintiffs. It is a purposeful assertion by plaintiffs of an ingredient of the claims in substantial sums which in this action they made against the defendant. They are not thought to have made the assertion lightly or without supporting his-

torical background." *DeLegrand v. United States* 182 F. Supp. 184 at 195. (Dist. Ct., Puerto Rico, 1959 or 1960.)

The court erred even more seriously and substantially in refusing to admit Exhibit 10. It was stipulated that said exhibit was authentic, with reservation of materiality and relevance. (TR 84, R 62) Identification being waived, Appellant offered ¶ 7 thereof and the court interrupted Appellee's counsel to state his own objection to it, asked the Appellee's counsel for an objection and sustained it. The provision which was excluded reads as follows:

> "That prior to September 9, 1963, the claimant sustained compensable industrial accidents to his lumbar spine, cervical spine, hands and face. That the combination of said previous injuries and the injury of September 9, 1963, have resulted in permanent disability and physical impairment equal to 100 per cent total permanent disability." (Paragraph 7 of Amended Complaint Before the Idaho Industrial Accident Board)

The Appellee testified that he had hired counsel to file the industrial accident claim for his 1963 September accident, that he hired Mr. Roberts and his associates, who are his counsel in this case. This was a substantial contradictory admission against interest and it is particularly interesting to note that it is an amendment to the actual original claim that was filed. The law is clear that such a statement against interest was admissible.

> "Under the rules discussed in subdivision a of this section the pleadings in a suit or action are admis-

sible for some purposes, as in the case of a verified pleading in a former action involving one or more of the parties to the suit, provided the pleadings are relevant and material . . . In a proper case a pleading may be introduced to collaborate or contradict a witness, to rebut an inference, or to establish an admission against interest . . ." 32 C.J.S. Evidence §633b, p. 804.

"Pleadings in one action are competent evidence in another, where the purpose is to contradict a party or his witness . . ." *Regenvetter v. Ball*, 131 Wash. 155, 229 Pac. 321 at 324 (1924).

The cases cited above in relation to Exhibit 12 are also applicable here. As the witness was not allowed to testify as to these matters or the jury to be informed on them, two very strong contradictory statements which were material and relevant were excluded.

A fourth item is the rejection of an offer of proof and sustaining objections to questions by Appellant concerning the amount of pay Appellee received in the last few years. Appellee was asked what he was paid at the Iran job and an objection was made that this was not material or relevant, which was sustained. (TR 389-90.) A request to make an offer of proof was made and subsequently granted. The offer of proof appears at TR 396, which are quotations from a deposition of Appellee. They show that in Iran he was making $1,000.00 a month, plus subsistence and in Colombia he was making $900.00 a month without subsistence. At the time of the original question, Appellant pointed out that this was relevant as to the ability of the Appellee in relation to his disability. The court rejected the offer of proof. This was error in that the amount

of money he received on his most responsible recent jobs indicates that he was acting as a supervisor and had the capacity to do supervisory work. As there is definite evidence that he can go back to a job so long as it doesn't involve heavy physical labor, this evidence was material and relevant in the question of whether he is totally and permanently disabled from carrying on any occupation or employment for which he is fit through education, training or experience.

2. Errors In Instructions To The Jury

The detailed instructions to which objection has been made are set forth in the specification of errors. The essence of the problem, except for definition questions, is the holding of the court as a matter of law that the "directly and independently of all other causes" clause of the policy includes the exclusionary provisions and that no instruction need be given on the exclusionary clauses of the policy. This is made clear in the court's comments to the Appellant's request that the exclusionary matter be added to Instruction No. 13. The court denied the request stating: "I feel 'directly and independently' must be all inclusive." (TR 424)

As to the individual errors believed committed by the court, they are as follows:

(a) The combination of Instructions Nos. 11 and 13 omit an essential element. We have already pointed out the error of instructing that "legal notice and proof of loss were timely made" (Instruction 11, TR 434) in that there was a question of fact for the jury. The question was whether the full year of "continuous total disability" had run at the time the proof of loss was filed. While Instruction 13 in ¶ 2 requires that the Ap-

pellee prove that such a full year of inability existed, at no point did either instruction raise the question for the jury of whether Appellee's proof of loss was filed only after such period had expired. The Court commits substantial error because in Instruction 13 it requires the jury to find whether such full year has existed, and yet by Instruction 11, by deciding as a matter of law that the proof of loss was timely, it decided the question of fact which it had submitted to the jury. There is no stipulation and no evidence that would create an uncontradicted evidentiary situation as to whether or not a full year of continuous total disability had existed before filing and the issue had to go to the jury. For this reason the instructions are inadequate. This was called to the court's attention in the second half of Appellant's requested instruction No. 2 (R 155) (TR 420-421).

(b) The next error relates to ¶ 2, line 8, of Instruction 10, the statement that the insurance company contends that the disability of February 21 resulted from the diagnostic treatment. Appellant requested that this should be deleted as the issue was not the treatment but the unusual result from stepping out of bed. (TR 434) The change was not made. Objection was also made in ¶ 2 of Instruction 10 to the words at line 9, (TR 434) "such event constituted an accident," that it was not clear which event was noted, and that the wording should read "such event constituted another accident." (TR 423) The instruction as written is confusing as to the specific claim of the Appellant that the February incident of stepping out of bed was an additional accident.

(c) Instruction 13 in ¶ 3 (TR 436) is the major

error in the court's instruction. Appellant specifically requested that the facts which must be found by the jury as to hold for Appellee should include both the clause of "directly and independently of all other causes," and an instruction concerning the exclusion if the same was effected by disease or bodily infirmity. As cited above from TR 424, the court specifically denied this, stating the "directly and independently" clause was all-inclusive. Also denied was Appellant's request that there be added to Instruction 13 the additional question of proof of whether the disabilities were caused by another accident following the September 9 accident (TR 424). The Appellant's requested instruction No. 4 in the latter part of the first paragraph requested this provision. Denying it is error, for this is a material question of fact.

(d) In Instruction 15, the court committed an error in adopting Appellant's requested Instruction 5 while deleting the last clause (R 158, TR 425). This is a defiinition of an accident and the deleted portion added "and is tragically out of proportion to the trivial cause." (TR 425) As the definition of an accident is both one that is improbable as well as a result out of proportion to the cause, the instruction as given is erroneous.

(e) Objection was made to Instruction 16 on the same basic reason as to Instruction 13, in that it includes the question of a cause being directly and independently of other causes without relation to the exclusion clauses of the policy (TR 425). The same argument applies.

(f) Objection was made to Instruction No. 17 re-

lating to Appellee's duty to submit to reasonable medical treatment in that it is inadequate to cover the pertinent question of whether the results of said treatment are within the accident policy. It being a question of fact whether the results of the event in February were so unusual and unexpected as to be a separate accident, or as to be an unexpected result of medical treatment, the jury is improperly instructed on this question (TR 425). Appellant requested an instruction in the first part of Requested Instruction 8 and in its oral request to the effect that ". . . if the normal treatment resulted in bizarre or unusual results, that we would not be responsible for them." (TR 425) Failure to instruct was error as material questions of fact existed as to the medical treatment, if that is what caused the disabilities upon stepping out of bed, and it should have been given to the jury.

(g) The same objection is made to Instruction 13, for the same reason (TR 425).

3. Prejudicial Remarks Of The Court

The impartial attitude of a judge on the trial of an action is most important. It has been so held in an action by plaintiff seeking to prove permanent total disability under an insurance contract, where the court commented about the insurer government's alleged practice of concealing information in its files,

> "Nor is this the only instance in the record where the judge failed to maintain an impartial attitude. He displayed a very hostile attitude to the defendant's witness, Dr. Wilson, and constantly prompted witnesses for the plaintiff. In these insurance cases brought by soldiers, every sympathy of

the juror is with the plaintiff and it is particularly imperative that the trial judge observe a scrupulous detachment." *Mason v. United States*, 63 F.2d 791 (C.C.A. Vt. 1933).

This case is in point with reference to the remarks of the court below concerning the admission of the physical examination, Exhibit 20, where the jury would be clearly convinced that the record was of some unusual importance, that the Appellant's objections to its admission were an effort to hide evidence that was material, and that the Appellant was merely delaying the trial (TR 243-246). On Appellee's objection, the Court first asked whether the Appellant wanted a recess, when it was the Appellee who was trying to offer the exhibit. He blamed the need for the recess, which was not called, on the Appellant because he would have to call the "proper officer." He then stated, "I don't believe it would be necessary," as to whether the proper officer should be called, and proceeded to examine the witness of the Appellee for the purpose of trying to lay a foundation for admission of the exhibit on behalf of the Appellee. The Appellant's attorney then found himself in the position of having to ask questions in aid of objection to the questions that the court was asking. (TR 245) At this point for the third time the court stated:

> "My only question now is whether you want to take time to get the office manager to identify them." (TR 246)

This required Appellant's counsel again to state the objection, for the third time, that no proper foundation or identification had been made, to which the court then replied:

"I am satisfied the identification is satisfactory and I am going to overrule the objection and I am going to admit Exhibit 20 . . ." (TR 246)

While the record does not reflect the inflections of the trial court, it is not difficult to understand in reading this last statement by the court below that it was made with some emphasis.

The errors committed by the court here are multiple, and they are in conjunction with a number of other remarks which indicated to the jury through accumulation, if not by individual nature thereof, the court's attitude. The court actively participated on behalf of Appellee following the offer of the exhibit by the Appellee noted above and at no point in the course of four pages of transcript did Appellee's attorney ever have to argue his side of the issue on the admission of the exhibit—the court was doing it for him.

The authorities specifically admonish a trial judge from so entering into a case.

"It is well known that jurors observe the suggestions and bearing of the judge during the trial, and if they can catch an expression or suggestion of the opinion of the court as to his views of the merits of the case, they are almost sure to reflect that opinion in their verdict. It is clearly reversible error for the court to make such a remark during the trial in the presence of the jury." *Goldstone v. Rustemeyer*, 21 Idaho 703, 123 Pac. 635 (1912), See also *LaChase v. Sanders*, 142 Conn. 122, 111 A.2d 690 at 692 (1955), and *Forte v. Schiebe*, 145 Cal. App. 2d 296, 302 P.2d 336 at 338 (1956).

In the *Goldstone* case the Idaho court commented, as to the value of merchandise delivered by an appel lant to a respondent, that a specific witness "has told them what it would be worth." This is quite similar to the court's remark here as to what the record of medical examination showed (TR 245) and that the exhibit was proper except merely as to the presence of an office manager to identify it (TR 245).

> "The practice of a judge entering into a trial of a case as an advocate is emphatically disapproved. The judge occupies an exalted and dignified position; he is the one person to whom the jury, with rare exception, looks for guidance, and from whom the litigants expect absolute impartiality. An expression indicative of favor or condemnation is quickly reflected in the jury box and at the counsel table. To depart from the clear line of duty through questions, expressions, or conduct, contravenes the orderly administration of justice . . ." *LaChase v. Sanders, supra.*

The court actively did all the things condemned in the above citation, including questioning the witness, arguing the Appellee's position for admission of the exhibit, remarking on its contents, and attempting to browbeat Appellant's counsel out of his objection by pointing to the delay that it was going to cause in the trial.

This same attitude of the court was reflected when Appellant was cross-examining Appellee's witness, Dr. Shaw (TR 192-193). In a chain of questions asked on the ability of Appellee to work, the court interrupted Appellant and (a) as to a question that was two answers back, (b) sustained an objection which he didn't even allow Appellee's counsel to state, and (c)

accused Appellant of asking an unfair question. He further erred in striking an answer of Appellee to appellant's question. Without reference to what question he was talking about, the court stated:

> "I don't think this is a fair question based on the testimony. I think it was his testimony he wasn't a working supervisor over these 150 men."

In a robbery case where the witness was testifying as to whether the plaintiff had checked into the hotel before or after the robbery and thought it was before, the trial court interrupted with the statement, "It doesn't make any difference, objection sustained." There the court stated:

> "The prejudicial conduct of the judge was made glaringly manifest, because he said 'objection sustained' when no objection had been interposed. Other remarks of the court were upon a similar line. These remarks of the trial judge were uncalled for, highly detrimental to the rights of the defendant, and were calculated to impress the jury that the judge was exerting himself in the interest of the plaintiff." *Coulson v. Wenzel Hotels, Inc.*, 248 Ill. App. 540, at 544 (1st Dist. App. Ct. 1928).

This is almost identical here, where the court below interrupted, sustained his own objection before the Appellee could even make one and struck the answer without a motion. This also happened elsewhere in the trial, to wit: The court interrupted Appellee on direct examination to say: "Would you like a glass of water?" (TR 30); interrupted Appellant's cross- examination of Appellee purportedly to keep out in advance otherwise inadmissible evidence without objection of Ap-

pellee's counsel (TR 50); interrupted Appellant's cross examination as to previous inconsistent statements by cutting off the Appellee's answer and commencing to ask Appellee questions himself (TR 50); by remarking that the vocabulary of the Appellee was a little bit more limited than counsel's (TR 51); cut off an objection to an offered exhibit being made by Appellee, stating the grounds for an objection he believed proper, with the request that the Appellee make such objections, which he then sustained (TR 84); sustained an objection that did not state any grounds to the admission of an exhibit of Appellant's and set forth the grounds in the statement sustaining the objection (TR 86); suggested to Appellee's counsel how to reword an objectionable question without ruling on the objection to it (TR 117-118); and suggested to Appellee's counsel on Appellant's objection that he change the word "allergy" to "irritation" in a question as to the myelogram's effect (TR 405).

Another example is where without Appellee's objection, the court prevents Appellee from testifying on Exhibits 8, 9, and 10 (TR 81).

Each of these particulars were in aid of the Appellee's case, and there is not a single instance where the same thing was done for the Appellant's case. This was held reversible error in the case of *Hays v. Viscome*, 122 Cal. App. 2d 135, 264 P.2d 173, at 179 (1953); there plaintiff contended that she was prejudiced by the conduct of the trial judge, consisting of constant interruptions of her counsel and her witnesses, comments of a critical nature and innumerable rulings sustaining objections upon trivial grounds, all of which, it was claimed, indicated the court was out

of sympathy with her case. The court declared:

". . . Although there is no evidence of prejudice in a legal sense, there is abundant evidence of a failure to exercise the high degree of patience and forbearance with counsel and witnesses which is the constant duty of the court in the trial of a jury case. It has been emphasized, time and again, that jurors are quick to observe the attitude of the court toward litigants and their counsel, whether favorable or unfavorable, and to be influenced thereby . . . When complaint is made upon this score, we have no disposition to be critical of the conduct of the trial court, and yet we may not ignore or minimize assignments of misconduct made with conviction and in good faith."

"Although one of several incidents of errors, standing alone, may be disregarded as harmless error, it is still possible that when considered in total they accumulate with such a cumulative prejudice that they may require reversal." Am. Jur. 2d, Appeal and Error §789, p. 230. See also cases cited there.

It is submitted that the above actions clearly intimated to the jury the court's attitude was favorable to Appellee to the prejudice of the Appellant.

APPENDIX

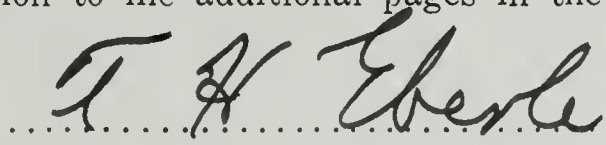
TABLE OF EXHIBITS

No. & Description of Exhibits	Marked (Record Page)	Admitted
Plf. Ex. 1—Application for Insurance	48	48
Plf. Ex. 2—Proof of Loss and Attending Physician's Statement	48, 49	48, 49
Plf. Ex. 3—Copy of the Insurance Policy	48, 49	48, 49
	(Transcript Page)	
Def. Ex. 4—Accident Policy	19	20
Def. Ex. 5—Employee's Application	19	20
Plf. Ex. 6—Hospital Records	79	111
Plf. Ex. 7—Hospital Records	79	(Not offered)
Def. Ex. 8—Memo of Agreement & Summary	80	(rejected, 83)
Def. Ex. 9—Industrial Accident Board File	80	(rejected, 83)

Def. Ex. 10—Industrial Accident Board Records	80	(rejected, 85; R180)
Def. Ex. 11—Reports of Nevada Industrial Commission	81	(rejected, 83)
Def. Ex. 12—Complaint	81	(rejected, 86)
Plf. Ex. 13—Anatomical Drawing	113	114
Plf. Ex. 14—Post card	164 (R173)	164 (R173)
Plf. Ex. 15 & 16—X-rays	197 (R173)	198 (R173)
Plf. Ex. 17 & 18—X-rays	198 (R173)	199 (R173)
Plf. Ex. 19—Application card for Insurance	240 (R173)	246 (R173)
Plf. Ex. 20—Physical record of Morrison-Knudsen	243 (R173)	246 (R173)
Plf. Ex. 22 through 28—X-rays	401 (R176)	401 (R176)
Def. Ex. 29—Letter dated September 9, 1964	413 (R176)	(Not offered, R176)

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules (with special application made for permission to file additional pages in the brief).



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